

(16,794.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 241.

THE NORTHERN PACIFIC RAILROAD COMPANY AND
THE NORTHERN PACIFIC RAILWAY COMPANY, PLAIN-
TIFFS IN ERROR,

vs.

SERETTE O. FREEMAN, IN HER OWN RIGHT AND AS
GUARDIAN OF SARAH FREEMAN, A MINOR, AND
LENNIE FREEMAN, A MINOR, BY HER GUARDIAN
AD LITEM, C. E. GRIFFIN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT.

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1 In the Circuit Court of the United States for the District of Washington, Western Division, July Term, 1895.

Be it remembered that on the 16th day of October, 1895, there was duly filed in said circuit court of the United States for the district of Washington, western division, a complaint, in words and figures as follows, to wit:

In the United States Circuit Court, District of the State of Washington, Western Division.

SERETTE O. FREEMAN, in Her Own Right and as Guardian of Sarah Freeman, Minor, Plaintiff,

vs.

ANDREW F. BURLEIGH, Receiver of the Northern Pacific Railroad, and Northern Pacific Railroad Company, a Corporation, Defendants.

Complaint.

The consent of the court having been first obtained to maintain this action, the plaintiff complains of the defendants and alleges:

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I.

That Sarah Freeman is a minor child of T. A. Freeman, deceased, and this plaintiff is the duly appointed, qualified, and acting guardian of the person and estate of the said minor; that such appointment was made on the 12th day of September, 1895, by an order of the superior court of the State of Washington, within and for Chehalis county; said appointment having been made in that certain proceeding and matter in the said court, entitled "In the matter of the estate and guardianship of Sarah Freeman."

II.

That the defendant The Northern Pacific Railroad Company now is, and at all times hereinafter mentioned was, a corporation duly incorporated and existing under and by virtue of a special act of the Congress of the United States of America, having its principal place of business in the city of New York, in the State of New York.

III.

That Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse were on the — day of —, 189—, duly appointed by the circuit court of the United States for the district of —, as receivers of and over the property and business of the said Northern Pacific Railroad Company; and that they afterwards qualified as such receivers, and at all times hereinafter mentioned were acting as such receivers of the business and property of the said railroad company; and as such receivers were operating the line of railroad in western Washington known as the Tacoma, Olympia &

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Gray's Harbor railroad, of which said line of railroad the said defendant Northern Pacific Railroad Company then and at all times hereinafter mentioned held a lease; and which said line of railroad was at the dates and times hereinafter mentioned being operated by the said receivers of the property and business of the said Northern Pacific Railroad Company in connection with its main line of said railroad company in the State of Washington.

IV.

That defendant Andrew F. Burleigh was on the 2nd day of October, 1895, duly appointed receiver of the Northern Pacific Railroad Company and of the property belonging to the said company, by the United States circuit court for the district of Washington, northern division, and is now acting as such receiver.

V.

That the railroad track of the said Tacoma, Olympia & Gray's Harbor railroad passes through or near the eastern corporate limits of the town of Elma, in the county of Chehalis, State of Washington; that at or near the said eastern corporate limits the said railroad track crosses the wagon road leading eastward from the main street of the said town of Elma, the same being a public highway, and in general use as a public highway; that for several hundred feet on either side of the said crossing there is a deep cut, the same being from ten to twenty feet deep, so that one passing along the said wagon road cannot see an approaching train westward bound until he is upon the said crossing; that because of a curve in the railroad track eastward of the said crossing and because of the said deep cut, and because of trees, brush, and other obstructions, one going eastward upon the said highway and within several hundred feet of the said crossing, cannot see an approaching train westward bound.

VI.

That on the 29th day of April, 1895, T. A. Freeman was passing along the said wagon road going eastward from the said town of Elma, in a common farm wagon drawn by two horses; that when crossing the said railroad track while proceeding along the said highway in the said farm wagon, and without fault or negligence on his part, he, the said Freeman, was run into and against by the engine drawing a freight train going westward, the said train being upon the said line of railroad, and which said engine and freight were then and there in the charge, custody, and control of the employees of the defendants in this action and of the said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as such receivers, and the said T. A. Freeman was thereby instantly killed; and the said defendants by and through their said employees did then and there negligently and carelessly run the said engine into, upon, and against, and kill the said T. A. Freeman.

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VII.

That at the time the said T. A. Freeman was struck and killed by the said engine as aforesaid he was proceeding along the said highway in pursuance of the ordinary course of his business; that the said engine and freight train were then and there being run negligently and carelessly and without proper and ordinary caution and care for the safety of the public by the said employees of these defendants; that the said employees did then and there run the said engine and freight train into the said cut and upon the said crossing without blowing the whistle or ringing the bell of the said engine, or in anywise giving the ordinary signals of the approach of the said train; that the said train was not being run upon schedule time, and was being run at a rapid rate of speed when the same reached the said crossing and when the same struck the said wagon in which said Freeman was riding; that persons in charge of a train approaching the said crossing from the east along the said railroad track cannot see a person or vehicle upon the said crossing until within a short distance thereof, because of a curve in the said railroad track, and because of the said railroad crossing being in a cut, and because — the trees growing along the bank of the said railroad track and of the said highway.

VIII.

6 That at the time of his said death, to wit, the 29th day of April, 1895, the said T. A. Freeman was the husband of this plaintiff and the father of the said minor child, Sarah Freeman; that the said T. A. Freeman was the only support and protector of plaintiff and of said minor child; that by reason of the death of said Freeman as aforesaid, and by reason of the said wrongful, careless, and negligent acts of the said employees of the said defendants, this plaintiff was and is deprived of the support, protection, and care of the said T. A. Freeman; that by reason of the death of the said T. A. Freeman, caused as aforesaid by the careless and negligent acts of the said employees of defendant, plaintiff and the said minor child have been deprived of the companionship of the said deceased and the pleasure and comfort of his society, and thereby caused to experience great mental anguish and suffering; by reason of all of which said acts and things herein set forth plaintiff has suffered great damage and in the sum of \$10,000.00; that the said T. A. Freeman was an intelligent man, capable of educating, nurturing, and controlling and fostering the said minor child, and by reason of the said death of the said T. A. Freeman, and by reason of the careless and negligent acts of the said employees of the said defendant, the said minor child is deprived of the support, protection, care, nurture, and education which he would otherwise have received from the said T. A. Freeman as her father; that because of all of the things herein mentioned the said minor child has suffered great damage in, to wit, the sum of \$5,000.

Wherefore, plaintiff prays judgment for damages against the said defendant, to wit:

- 7 1. For the sum of \$10,000.00 damages to herself in person.
 2. For the sum of \$5,000.00 damages for and in behalf of the said Sarah Freeman, minor child.
 3. For costs of suit and any and all proper relief in the premises.

J. B. BRIDGES AND

O. V. LINN,

Attorneys for Plaintiff.

STATE OF WASHINGTON, }
 County of Chehalis, } ss:

Serette O. Freeman, being first duly sworn, upon oath says that she is the plaintiff mentioned in the foregoing-entitled action; that she has read the foregoing complaint, knows the contents of the same, and that the matters and things therein contained are true as she verily believes.

SERETTE OLLIE FREEMAN.

Subscribed and sworn to before me this 7 day of October, 1895.

J. W. HINES,

*Justice of the Peace for Elma Precinct, Chehalis**County, State of Washington.*

(Endorsed:) Filed in the U. S. circuit court Oct. 16, 1895. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

8 And afterwards, to wit, on Wednesday, the 21st day of October, 1896, the same being the 28th judicial day of the regular July term of said court—present: the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

In the United States Circuit Court for the District of Washington,
 Western Division, Ninth Circuit.

SERETTE O. FREEMAN, in Her Own Right and as Guardian
 of Sarah Freeman, a Minor, Plaintiff,

vs.

ANDREW F. BURLEIGH, Receiver of the Northern Pacific
 Railroad, and Northern Pacific Railroad Company, a
 Corporation, Defendants.

No. —.

Order Allowing Intervention for Lennie Freeman.

The complaint in intervention by C. E. Griffin, as guardian *ad litem* of Lennie Freeman, for an order to be made a party plaintiff in this action, came on this day for hearing, and it appearing to the court that an order had been previously made by this court directing service of said complaint in intervention, and said order to be made on the parties to this action, or their attorneys of record, by delivering a copy of said order and said complaint in intervention to each of said parties, or their said attorneys respectively, at least ten days before the time fixed for the

hearing thereof, and it appearing to the court that said order has been complied with, and that today at 10 a. m., was the time fixed for said hearing, and that none of the parties cited have appeared and made any objection to the granting of an order allowing said guardian *ad litem* to be made a party plaintiff, as the representative of said minor—

It is therefore ordered that the said minor and said C. E. Griffin, as guardian *ad litem* of said minor, Lennie Freeman, be and they are allowed and authorized to *intervent* in this action, and are made parties plaintiff therein. The complaint may be amended to conform to this order.

Ordered, this the 21st day of October, A. D. 1896.

C. H. HANFORD, *Judge*.

(Endorsed :) Filed in the U. S. circuit court. Oct. 21, 1896. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

10 And afterwards, to wit, on Wednesday, the 21st day of October, 1896, the same being the 28th judicial day of the regular July term of said court—present, the Hon. Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

In the United States Circuit Court for the District of Washington,
Western Division.

SERETTE O. FREEMAN, in Her Own Right and as Guardian of Sarah Freeman, Plaintiff,	} No. 404.
vs.	
ANDREW F. BURLEIGH, Receiver of the Northern Pacific Railroad Company, and Northern Pacific Railroad Company.	}

Order for Substitution.

This cause coming on regularly to be heard in open court, and at a regular term of this court, on this 21st day of October, 1896, all parties being present in open court, by their counsel, on motion of counsel for defendants, the counsel for the Northern Pacific Railway Company and counsel for the plaintiff, and each of them assenting hereto—

11 It is ordered that said Northern Pacific Railway Company be, and the same is hereby, substituted as a party defendant in this action, in the place and stead of Andrew F. Burleigh, as receiver for one of the defendants herein, and the said Andrew F. Burleigh is hereby released and relieved of all liability in connection with this action.

C. H. HANFORD, *Judge*.

(Endorsed :) Filed in the U. S. circuit court Oct. 21, 1896. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

And afterwards, to wit, on the 13th day of November, 1896, there was duly filed in said court, in this cause, an amended complaint, in the words and figures as follows, to wit:

12 In the United States Circuit Court for the District of Washington, Western Division, Ninth Circuit.

<p>SERETTE O. FREEMAN, in Her Own Right, and as Guardian of Sarah Freeman, a Minor; Lennie Freeman, a Minor, by her Guardian <i>ad Litem</i>, C. E. Griffin, Plaintiffs,</p> <p>ANDREW F. BURLEIGH, Receiver of the Northern Pacific Railroad Company, a Corporation, and The Northern Pacific Railroad Company, a Corporation, Defendants.</p>	<p><i>vs.</i></p>	}	<p>No. —.</p>
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Amended Complaint.

The aforesaid plaintiffs, by leave of court first had, now come and present this their amended complaint in said action, and for cause of action complain of the said defendants and allege:

1.

That the said Sarah Freeman is a minor child of T. A. Freeman, deceased, and the said Serette O. Freeman, and the latter is the duly appointed, qualified, and acting guardian of the person and estate of the said minor. That such appointment was made on the 12th day of September, 1895, by an order of the superior court of the State of Washington, in and for Chehalis county, said appointment having been made in that certain proceeding and matter in said court, entitled "In the matter of the estate and guardianship of Sarah Freeman."

2.

That Lennie Freeman is the minor child of T. A. Freeman, deceased, and C. E. Griffin is the duly appointed guardian *ad litem* of said minor, for the purpose of bringing this action, having been heretofore duly appointed such guardian for said purpose by the superior court of the State of Washington, in and for the county of Pierce.

3.

That leave of court was duly had prior to the bringing of this action, for the bringing of the same against Andrew F. Burleigh, the receiver of the Northern Pacific Railroad Company, and the said Lennie Freeman, through her guardian *ad litem*, C. E. Griffin, was heretofore by order of court permitted to intervene in this action and become a party plaintiff herein.

4.

14 That the defendant, The Northern Pacific Railroad Company, now is, and at all times hereinafter mentioned was, a corporation duly incorporated and existing under and by

virtue of a special act of the Congress of the United States of America, having its principal place of business in the city of New York, in the State of New York.

5.

That Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse were on the — day of —, 189—, duly appointed by the circuit court of the United States for the district of —, as receivers of and over the property and business of the said Northern Pacific Railroad Company, and that they afterwards qualified as such receivers, and at all times hereinafter mentioned were acting as such receivers of the business and property of the said railroad company; and as such receivers were operating the line of railroad in western Washington known as the Tacoma, Olympia and Gray's Harbor railroad, of which said line of railroad the said defendant Northern Pacific Railroad Company then, and at all times hereinafter mentioned, held a lease, and which said line of railroad was at the dates and times hereinafter mentioned being operated by the said receivers of the property and business of the said Northern Pacific Railroad Company, in connection with its main line of said railroad company in the State of Washington.

15

6.

That the defendant Andrew F. Burleigh was on the 2d day of October, 1895, duly appointed receiver of the Northern Pacific Railroad Company, and of the property belonging to the said company, by the United States circuit court for the district of Washington, northern division, and is now acting as such receiver.

7.

That the railroad track of said Tacoma, Olympia, and Gray's Harbor railroad passes through or near the eastern corporate limits of the town of Elma, in the county of Chehalis, State of Washington; that at or near the said eastern corporate limits the said railroad track crosses the wagon road leading eastward from the main street of the said town of Elma, the same being a public highway and in general use as a public highway; that for several hundred feet on either side of the said crossing there is a deep cut, the same being from ten to twenty feet deep, so that one passing along the said wagon road cannot see an approaching train eastward bound until he is upon the said crossing; that because of a curve in the railroad track eastward of the said crossing, and because of the said deep cut, and because of trees, brush, and other obstructions, one going eastward upon the said highway and within several hundred feet of the said crossing cannot see an approaching train eastward bound.

16

8.

That on the 29th day of April, 1895, T. A. Freeman was passing along the said wagon road going eastward from the said town of Elma in a common farm wagon drawn by two horses; that when

crossing the said railroad track, while proceeding along the said highway in the said farm wagon, and without fault or negligence on his part, he, the said Freeman, was run into and against by the engine drawing a freight train going eastward, the said train being upon the said line of railroad, and which said engine and freight train were then and there in charge, custody, and control of the employees of the defendants in this action, and of the said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as such receivers, and the said T. A. Freeman was thereby accidentally killed, and the said defendants, by and through their said employees, did then and there negligently and carelessly run the said engine into, upon, and against, and kill the said T. A. Freeman.

9.

That at the time the said T. A. Freeman was struck and killed by the said engine as aforesaid he was proceeding along the said highway pursuant of the ordinary course of his business; that the said engine and freight train were then and there being run negligently and carelessly, and without proper and ordinary caution and care for the safety of the public, by the said employees
17 of these defendants; that the said employees did then and there run the said engine and freight train into the cut and upon the said crossing without blowing the whistle or ringing the bell of said engine, or in anywise giving the ordinary signals of the approach of the said train; that the said train was not being run upon schedule time, and was being run at a rapid rate of speed when the same reached the said crossing, and when the same struck the said wagon in which the said Freeman was riding; that persons in charge of a train approaching the said crossing from the east along the said railroad track, cannot see a person or vehicle upon the said crossing until within a short distance thereof, because of the curve in the said railroad track, and because of the said railroad crossing being in the cut, and because — the trees growing along the bank of the said railroad track and of the said highway.

10.

That the said Lennie Freeman is the minor child of the said T. A. Freeman, as the offspring of his marriage with Nettie Hotchkiss Freeman, and that said minor is now about the age of thirteen years, and was entitled to the support and protection of the said T. A. Freeman during her minority. That by reason of the death of the said T. A. Freeman, as aforesaid, and by reason of the said wrongful, careless, and negligent acts of the said employees of the said defendant, the said minor was and is deprived of the support, protection, and care of the said T. A. Freeman; that by reason of
18 the death of the said T. A. Freeman, caused as aforesaid by the careless and negligent acts of the said employees of defendants, and by reason of all of which said acts and things herein set forth, plaintiff has suffered great damage in the sum of \$10,000.00. That the said T. A. Freeman was an intelligent man, capable of educating, nurturing, and controlling and fostering the said minor

children, and that by reason of the said death of the said T. A. Freeman, and by reason of the careless and negligent acts of the said employees of the said defendant, the said minor children are deprived of the support, protection, care, nurture, and education which they would otherwise have received from the said T. A. Freeman as their father. That because of all of the things herein mentioned the said minor children have suffered great damage, in, to wit, the sum of five thousand dollars (\$5,000) each.

12.

That subsequent to the bringing of this action and prior to this time the aforesaid court, in the aforesaid action, made an order dismissing this action as to said defendant Burleigh, receiver, etc., and substituting the Northern Pacific Railway Company, a corporation, as defendant.

Wherefore plaintiffs pray judgment for damages against the said defendant Northern Pacific Railway Company, as follows:

1. For the sum of \$10,000 damages to the said widow in person.
- 19 2. For the sum of \$5,000 damages for and in behalf of the said Sarah Freeman, minor child.
3. For the sum of \$5,000 damages for and in behalf of the said Lennie Freeman, minor child.
4. For costs of suit and any and all proper relief in the premises.

J. B. BRIDGES,

O. V. LINN,

*Attorneys for Serette O. Freeman Individually
and as Guardian of Sarah Freeman, a Minor.*

SIDNEY M. HEATH,

HUDSON & HOLT,

*Attorneys for C. E. Griffin, Guardian ad Litem for
Lennie Freeman, a Minor.*

STATE OF WASHINGTON, }
County of Pierce, } ss:

O. V. Linn, being first duly sworn, on oath deposes and says that he is one of the attorneys for the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that he believes the same to be true; that he verifies this complaint for the reason that the plaintiff is outside of the county of Pierce at this time.

O. V. LINN.

Subscribed and sworn to before me this 11th day of Nov., 1896.

[SEAL.]

R. S. HUDSON,

*Notary Public in and for said State,
Residence at Tacoma, in said County.*

20 (Endorsed:) Filed in the U. S. circuit court Nov. 13, 1896.
A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

And afterwards, to wit, on the 19th day of November, 1896, there was duly filed in said court, in this cause, an answer to amended complaint in the words and figures as follows, to wit:

In the United States Circuit Court for the District of Washington,
Western Division, Ninth Circuit.

<p>SERETTE O. FREEMAN, in Her Own Right and as Guardian of Sarah Freeman, a Minor; Lennie Freeman, a Minor, by Her Guardian <i>ad Litem</i>, C. E. Griffin, Plaintiffs,</p>	<p>vs.</p>	<p>ANDREW F. BURLEIGH, Receiver of the Northern Pacific Railroad Company, a Corporation, and The Northern Pacific Railroad Company, a Corporation, Defendants.)</p>	}	<p>No. 404.</p>
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Answer to Amended Complaint.

21 Comes now the Northern Pacific Railroad Company, and the Northern Pacific Railway Company, substituted in place and stead of Andrew F. Burleigh, receiver of the Northern Pacific Railroad Company, and answers the amended complaint herein filed as follows:

1.

For answer to paragraph 1 of said amended complaint, these defendants deny that they have any knowledge or information sufficient to form a belief as to any of the allegations in said paragraph contained.

2.

For answer to paragraph 2 of said amended complaint, these defendants deny that they have any knowledge or information as to any of the matters therein alleged sufficient to form a belief.

3.

For answer to paragraph 7 of said amended complaint, these defendants admit that the railroad track of the said Tacoma, Olympia & Gray's Harbor Railroad Company passes through or near the eastern corporate limits of the town of Elma, county of Chehalis, State of Washington, and these defendants, and each of them, deny each and every other allegation in said paragraph contained.

4.

22 For answer to paragraph 8 of said amended complaint, these defendants deny that said Freeman was without fault or negligence, but allege that he was accidentally killed by reason of his own contributory negligence, as hereinafter alleged, and deny that the said T. A. Freeman was killed by reason of the fault or negligence of these defendants, or of either of them, or by reason of the fault or negligence of the employees of the defendants, or either of them, or of the said Andrew F. Burleigh, receiver,

and deny that defendants, or either of them, or the said Andrew F. Burleigh, or that the servants, agents, and employees of said defendants, or of the said Andrew F. Burleigh, or either or any of them, were negligent or careless at all; deny that the said Freeman was killed by reason of the carelessness or negligence of the employees of said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers, or otherwise, or by reason of the carelessness or negligence of the employees, servants, or agents, or either of them, or by reason of any negligence on the part of the said Oakes, Payne, and Rouse, or by reason of the carelessness or negligence of said defendants, or either of them, or of the said Burleigh, receiver.

5.

For answer to paragraph 9 of said amended complaint, these defendants deny each and every allegation therein contained.

6.

23 For answer to paragraph 10 of said amended complaint, these defendants deny that they have any knowledge or information sufficient to form a belief as to whether the said Lennie Freeman is the minor child of the said T. A. Freeman, as the offspring of his marriage with Nettie Hotchkiss Freeman, or otherwise, or that said minor child is now about the age of thirteen years, or that said child was entitled to the support and protection of the said T. A. Freeman, during her minority. These defendants deny that by reason of the death of the said T. A. Freeman, or that by reason of any wrongful, careless, or negligent act, or acts, of the employees of these defendants, or of either of them, or of the said Andrew F. Burleigh, either as receiver or otherwise, the said minor was or is deprived of the support or protection of said T. A. Freeman, or has suffered great or any damage by reason of the death of the said T. A. Freeman, either in the sum of five thousand dollars or in any sum of money whatever.

7.

For answer to paragraph 11 of said complaint, these defendants deny that they have any knowledge or information sufficient to form a belief as to whether at the time of the death of said T. A. Freeman, or at any time, the said T. A. Freeman was the husband of plaintiff, or father of the said minor child, Sarah Freeman, or that the said T. A. Freeman was the only support and protector of plaintiff and of said minor child, or either of them, and said defendants deny each and every allegation in said paragraph contained.

24 And for other and further and affirmative defense these defendants allege:

1.

That said T. A. Freeman, at the date alleged in the amended complaint, met with the accident resulting in his death, solely by and through his own carelessness and negligence in approaching

the said crossing of the railroad of defendants described in the amended complaint, without exercising any care to observe the approach of the train of defendants', and without exercising due or any care in approaching said railroad and crossing over same, and by reason of his negligence and want of care in not stopping or looking or listening to see whether or not any train or engine was about to pass upon said railroad, over and across said crossing, and the said T. A. Freeman was accidentally killed without any fault, carelessness, or negligence on the part of the said Andrew F. Burleigh, as receiver, or of the said defendants, or either of them, or of the servants, agents, or employees of the said defendants or either of them, or of the said Andrew F. Burleigh, as receiver, or of any one except the said T. A. Freeman himself.

Wherefore defendants pray for judgment herein for their costs and disbursements.

CROWLEY & GROSSCUP,

*Attorneys for Defendants, N. P., General Office Bld.,
Tacoma, Washington.*

25 STATE OF WASHINGTON, } ss:
County of Pierce,

A. Tinling, being first duly sworn, on oath deposes and says that he is general agent of The Northern Pacific Railway Company, one of the defendants in the above-entitled action; that he has read the foregoing answer to amended complaint, knows the contents thereof, and that he believes the same to be true.

A. TINLING.

Subscribed and sworn to before me this 16th day of November, 1896.

[SEAL.]

W. L. SAHSE,
*Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.*

(Endorsed:) Filed Nov. 19th, 1896. A. Reeves Ayres, clerk.

And afterwards, to wit, on Friday, the 19th day of February, 1897, the same being the 11th judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

26

Trial.

Now, on this day, this cause came regularly on for trial, O. V. Linn and J. B. Bridges, Esqs., appearing for the plaintiff, Crowley & Grosscup, Esqs., for the defendant, and Hudson & Holt and S. M. Heath, Esqs., on behalf of C. E. Griffin, as guardian *ad litem*, intervenor; a jury being called, the following-named persons answered to their names and were duly sworn to try the case, to wit:

Thereupon the trial duly proceeded until the hour of adjournment, when, by consent, the jury was duly admonished by the court, and allowed to separate until the incoming court tomorrow morning.

And afterwards, to wit, on Tuesday, the 23d day of February, 1897, the same being the 14th judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

Trial (Continued).

This cause came on regularly at this time for further trial; the jury having been called, the trial duly proceeded to the conclusion of the testimony and arguments of counsel, when the jury, having been charged by the court, retired to deliberate upon its verdict.

And afterward, after due deliberation, the jury comes into open court and, being called, returns the following verdict, to wit:

In the United States Circuit Court for the District of Washington,
Western Division.

SERETTE O. FREEMAN, in Her Own Right and as Guardian of Sarah Freeman, a Minor, by Her Guardian <i>ad Litem</i> , C. E. Griffin, Plaintiffs,	} No. 404.
<i>vs.</i>	
NORTHERN PACIFIC RAILWAY COMPANY, Substituted, Defendant.	

Verdict.

We, the jury, find for the plaintiffs, and fix their damages at the sum of \$9,000.00, and apportion the same among the plaintiffs as follows:

To Serette O. Freeman.	\$5,000.00
To Serette O. Freeman, guardian <i>ad litem</i> of Sarah Freeman, minor.	2,000.00
To C. E. Griffin, guardian <i>ad litem</i> of Lennie Freeman, minor.	2,000.00

F. M. SWEET, *Foreman*.

28 And afterwards, to wit, on Wednesday, the 24th day of February, 1897, the same being the 15th judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit,
District of Washington, Western Division.

SERETTE O. FREEMAN, in Her Own Right and as Guardian of
Sarah Freeman, a Minor; Lennie Freeman, a Minor, by Her
Guardian *ad Litem*, C. E. Griffin, Plaintiffs,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and THE
Northern Pacific Railway Company, a Corporation, Defendants.

Order Staying Execution.

On motion of defendant- in the above-entitled action, it is ordered
that execution on the judgment in the above-entitled action be
stayed for the period of 35 days from and after this date, in
29 order that said defendants may prepare and file a petition
for a new trial within said time, according to the law and
practice of this court in such cases made and provided.

Dated Tacoma, Wash., February 24, 1897.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed in the U. S. circuit court Feb. 24, 1897. A.
Reeves Ayres, clerk. Sam'l D. Bridges, dep.

In the Circuit Court of the United States, Ninth Judicial Circuit,
District of Washington, Western Division.

SERETTE O. FREEMAN, in Her Own Right and as Guardian of
Sarah Freeman, a Minor; Lennie Freeman, a Minor, by Her
Guardian *ad Litem*, C. E. Griffin, Plaintiffs,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and THE
Northern Pacific Railway Company, a Corporation, Defendants.

Order Extending Time for Filing Bill of Exceptions.

On motion of defendant- in the above-entitled cause, it appearing
that there is good cause for such action—

30 It is ordered that the said defendants have thirty-five days
from this date in which to draw up, serve, and file their bill
of exceptions in said cause, and also that defendants have the same
time in which to prepare and present their bill of exceptions to the
charge of the court to the jury.

Dated February 24th, 1897.

C. H. HANFORD, *Judge.*

We hereby consent to the making of the above order.

J. B. BRIDGES AND

O. V. LYNN,

Attorneys for Plaintiffs S. O. Freeman and Child.

SIDNEY MOORE HEATH,

Of Attorneys for Griffin, Guardian ad Litem.

(Endorsed:) Filed Feb'y 24th, 1897. A. Reeves Ayres, clerk.

31 And afterwards, to wit, on the 18th day of March, 1897, there was duly filed in said court, in this cause, a bill of exceptions in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit,
District of Washington, Western Division.

SERETTE O. FREEMAN, in Her Own Right and as Guardian of Sarah Freeman, a Minor, and Lennie Freeman, a Minor, by Her Guardian <i>ad Litem</i> , C. E. Griffin, Plain- tiffs,	} No. —.
<i>vs.</i>	
NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and The Northern Pacific Railway Company, a Corpo- ration, Defendants.	

Bill of Exceptions.

Be it remembered that this cause came on for trial on the 19th day of February, 1897, before the Honorable C. H. Hanford, judge of the above-entitled court, and a jury was duly impaneled and sworn to try the cause, the said plaintiffs appearing by O. V. Linn, J. B. Bridges, Sidney Moore Heath, and Hudson & Holt, their attorneys, and the defendants appearing by Crowley & Grosseup, their attorneys.

32 Whereupon the following witnesses were sworn and examined on behalf of the respective parties, and the following requests were made and exceptions taken and allowed as herein stated, viz:

Mrs. SERETTE O. FREEMAN, one of the plaintiffs, called as a witness on behalf of plaintiffs, sworn, testified as follows:

Examined in chief by Mr. BRIDGES:

Q. Mrs. Freeman, you may state your full name.

A. Mrs. Serette O. Freeman.

Q. You are one of the plaintiffs in this case, are you, Mrs. Freeman?

A. Yes, sir.

Q. Where were you living in the spring of 1895, Mrs. Freeman?

A. In Missouri.

Q. Where were you living in April, 1895?

A. We were living in Missouri.

Q. In April, 1895?

A. Yes, sir.

Q. Were you acquainted with T. A. Freeman?

A. Yes, sir.

Q. Where was he living at the time of his death?

A. He was living near Elma, in Chehalis county.

Q. In this State?

A. In Washington; yes, sir, this State.

Q. What direction from Elma was he living?

33 A. He was living east of Elma.

Q. Where were you living at the time of his death?

A. We were living on the ranch east of Elma, in Chehalis county, Washington.

Q. You may state what relation, if any, you sustained towards Mr. Freeman at the time of his death, whether or not you were his wife or otherwise.

A. I was his wife at the time of his death; yes, sir.

Q. When were you married to him, Mrs. Freeman?

A. In 1895.

Q. What month?

A. The 5th of December.

Q. You were his wife at the time of the accident then?

A. Yes, sir.

Q. Where were you on the day of the accident?

A. I was at the ranch, at the home place.

Q. Are you acquainted with the crossing at which your husband was killed?

A. Yes, sir.

Q. You have passed over it, have you?

A. Yes, sir.

Q. Many times?

A. Yes, sir; a number of times.

(Paper handed witness.)

Q. I desire to hand you this certificate, Mrs. Freeman, for the purpose of refreshing your memory as to the date of your marriage. You were mistaken, were you not, in the date you gave? You notice the date here at the bottom.

A. I was mistaken in the date. I had forgotten the exact date.

34 Q. Tell the court and jury what day you were married to Mr. Freeman.

A. On the 5th day of December, 1893.

Q. It was in 1893, then, instead of 1895?

A. Yes, sir; 1893.

Q. Have you any children resultant from that marriage?

A. Yes, sir; one.

Q. What is its age at this time?

A. Two years and six months, between five and six months.

Q. What was its age at the time of this accident, at the time that your husband was killed?

A. She was between six and seven months old.

Q. What is her name?

A. Sarah Freeman.

Q. Were you acquainted with this team of horses—do you know what team of horses your husband was driving on the day he was killed?

A. Yes, sir.

Q. Were you acquainted with the team?

A. Yes, sir; well acquainted with the team.

Q. Describe to the jury as nearly as you can what kind of a team it was, in a general way.

A. The team was a good, steady farm team, gentle, well kept, and taken care of—a good, trusty team.

Mr. BRIDGES: We desire to introduce in evidence certified copies of the petition and the bond and order appointing Mrs. Freeman as guardian of her minor child.

Mr. GROSSCUP: We have no objection.

35 The COURT: They may be admitted.

(Papers referred to received in evidence, marked Plaintiffs' Exhibit "A," Plaintiffs' Exhibit "B," Plaintiffs' Exhibit "C," and Plaintiffs' Exhibit "D.")

Mr. BRIDGES: We also ask leave to introduce by certified copy the marriage license and certificate of marriage.

Mr. GROSSCUP: No objections.

The COURT: It may be admitted.

(Paper referred to received in evidence and marked Plaintiffs' Exhibit "E.")

Mr. BRIDGES: We also offer to present, by certified copy, a decree of divorce obtained out of the court of Chehalis county, Washington. While the testimony at this time does not tend to show that this last paper is relevant, probably from the statement made to the jury by Mr. Hudson, it might be best to offer it now. This is merely to show the dissolution of the marriage between Thomas Freeman and his former wife to show the validity of this marriage.

(Paper referred to marked for identification Plaintiffs' Identification "F.")

Mr. GROSSCUP: This certified copy of the decree of divorce is objected to, for the reason that the paper does not show that the court had any jurisdiction to make such a judgment; further, it shows nothing relative to any children, and it is entirely immaterial, incompetent, and irrelevant for any purpose in this case.

The COURT: Objection overruled.

Mr. GROSSCUP: We note an exception.

36 The COURT: Exception allowed.

(Paper referred to received in evidence, marked Plaintiffs' Exhibit "F.")

Q. What was your age at the time of Mr. Freeman's death?

A. I was thirty.

Q. You were thirty years old?

A. Yes, sir.

Q. What was the age of your husband at the time of his death?

A. Thirty-two.

Q. You may describe to the jury what kind of a man he was physically, whether he was strong or weak, sickly or otherwise.

A. He was a strong, healthy man.

Q. Did he have any disease or sickness, or anything of that kind?

A. No, sir; no disease or sickness at all.

Q. Was he customarily sick?

A. No, sir, he was not.

Mr. BRIDGES: We desire to excuse this witness with the privilege of recalling her later on. This is all of her testimony that is relevant at this time.

Cross-examined by Mr. GROSSCUP:

Q. Mrs. Freeman, Mr. Freeman's eyesight was good, was it not?

A. Yes, sir.

Q. His hearing was good?

A. Yes, sir.

37 Q. He was sober and industrious?

A. Yes, sir; he was a sober man and an industrious man; very industrious.

Q. Do you own the ranch where you were living?

A. No, sir; the ranch is in his mother's name; his mother has the ranch.

Q. You and Mr. Freeman were cultivating it?

A. We were cultivating it and living on the ranch.

Q. How long had he had this team of horses?

A. He had had that team of horses, I could not say just how long, but quite awhile. It was the only team that he had had on the ranch—perhaps he had had one other. He had had three horses on the ranch, but this team he had had quite awhile.

Q. Now, in coming from your ranch where you lived to Elma you crossed the railroad track, did you not?

A. Yes, sir.

Q. At the place where Mr. Freeman was killed?

A. Yes, sir.

Q. Did he frequently cross there?

A. Well, quite frequently.

Q. Well, every time he would come to Elma from the ranch he crossed there, did he not?

A. Yes, sir. Every time he had to go to Elma he had to cross the railroad track. Sometimes it was quite often—well, I don't know just how often.

Q. Well, would you say that he had very frequently crossed at this place?

A. Yes, sir.

Q. How long had Mr. Freeman lived there?

38 A. In Washington, or on that ranch?

Q. No; at that ranch.

A. He had been living there from the 5th of December up to the time he was killed.

Q. You lived there together, did you?

A. Yes, sir; we moved on the ranch together. He had owned the ranch, but had been off and on the ranch for some three or four years.

Q. But you actually lived on the ranch?

A. Oh, yes; we moved onto the ranch.

Q. In December, '94, that would be ?

A. Yes, sir.

Q. Was this team of horses you had a gentle team and accustomed to the cars ?

A. Yes, sir.

Q. Accustomed to the cars ?

A. Yes, sir.

Q. They were driven to the depot frequently ?

A. Yes, sir.

Q. Were not accustomed to being frightened at anything ?

A. No, sir.

Mr. GROSSCUP : That is all.

Mr. BRIDGES : That is all at the present time, but we shall desire to recall this witness later on.

Examination of Mrs. Freeman closed.

Mr. HUDSON : We wish to read now in evidence the deposition of Mrs. Nettie Freeman, taken under stipulation in this case.

39

Deposition of Mrs. Nettie Freeman.

"Deposition of witness produced and sworn and examined at Bloomfield, Iowa, in the county of Davis and State of Iowa, before me, D. H. Payne, a notary public in and for said county and State, in a certain cause now pending in the United States circuit court for the district of Washington, ninth circuit, western division, wherein Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, plaintiffs, against Andrew F. Burleigh, receiver of the Northern Pacific Railroad Company, a corporation, and The Northern Pacific Railroad Company, a corporation, defendants, on the part of the plaintiffs.

Mrs. NETTIE HOTCHKISS FREEMAN, of lawful age, sworn and examined on the part of the plaintiff, deposeth and saith :

Interrogatory 1. Are you acquainted with Lennie Freeman, who appears by her guardian *ad litem* as a plaintiff in this action ? If so, state whether or not you bear any relation to her, and, if so, what is this relation ?

Answer. I am ; I am her mother.

Interrogatory 2. What is the present age of said Lennie Freeman ?

Answer. She was thirteen years old on December 5, 1896.

Interrogatory 3. Who are the parents of said Lennie Freeman ?

Answer. I am her mother and Thomas A. Freeman was her father.

40 Interrogatory 4. Were you acquainted with one T. A. Freeman, and if so, state whether or not the said T. A. Freeman is living, and if not, give the place, date, manner, and cause of his death, and state where he was living when you last heard from him.

Answer. I was acquainted with T. A. Freeman; he is not now living. He was killed in the spring of 1895 at or near Elma, State of Washington. He was killed at a crossing of the railroad near said place while attempting to cross the track of said railroad, and Elma, Washington, was the place where he was living at the time when I last heard from him.

Interrogatory 5. When was the said Lennie Freeman born and what relation existed between you and the said T. A. Freeman at the time of her birth? If you say you were husband and wife, state when and where you were married and how long you lived together.

Answer. She was born in Davis county, Iowa, and T. A. Freeman and I were husband and wife at the time of her birth. T. A. Freeman and I were married in Davis county, Iowa, on December 23d, 1882, and we lived together as husband and wife about five years.

Interrogatory 6. State whether or not at the time of the death of the said T. A. Freeman the said Lennie Freeman was living with him, and if not, to what extent had he been contributing to her support and education prior to his death.

Answer. She was not living with him. He sent money and clothes and presents to her from time to time, the exact amount cannot now be ascertained, but it was enough to pay for her support, clothing and schooling. He also gave me about \$200.00

41 worth of real estate to be used for her support and education, and promised to arrange to furnish money to get her a musical education, and promised to turn over his life-insurance policies for her benefit, but I never got the policies and the real estate was encumbered.

Interrogatory 7. What arrangements, if any are known to you, were made or contemplated by said T. A. Freeman for the future support or education of the said Lennie Freeman?

Answer. He made the arrangement as stated in the answer to the last interrogatory above.

Interrogatory 8. What, if any, property is said Lennie Freeman possessed of in her own right?

Answer. She has an organ which her father sent money to buy for her. That is all the property she has.

Interrogatory 9. What, if any, property are you possessed of?

Answer. I have a one half interest in a house and lot in Pulaski, Iowa, worth about \$400.00, and some household and kitchen furniture; that is all.

Interrogatory 10. If you stated in answer to the 8th interrogatory that said Lennie Freeman is possessed of property, state through whom she received the same.

Answer. Through her father, T. A. Freeman.

Interrogatory 11. State whether or not the said T. A. Freeman had a trade or profession, and, if so, what it was.

Answer. He was a railroad man, brakeman, and baggageman. He was also for a while a traveling salesman for a Chicago firm for school supplies.

42 Interrogatory 12. State whether or not he had an adaptability to do some particular work, and, if he had, what it was.

Answer. He had a good adaptability both as a railroad man and as a salesman.

Interrogatory 13. State what his capacity for work was, and give his age as near as you can at the time of his death, or give the date of his birth if you can.

Answer. He was about 34 years old when he died. His birthday was March 19th, 1861, I think, and I believe. He was a stout, able-bodied man, and had a great capacity for work, and was an industrious man.

Interrogatory 14. State how much, if you know, the said T. A. Freeman was capable of earning.

Answer. While he was a salesman, he made as high as \$270.00 per month, and as a railroad man as high as \$60.00 per month.

Interrogatory 15. State anything else that you may know that may be of material interest to the said Lennie Freeman or her said guardian in this action.

Answer. T. A. Freeman had great affection for Lennie, and was always anxious to do all he could for her.

Cross-interrogatory 1. If in answer to interrogatory 4, you say that T. A. Freeman was killed, state whether or not you were present at the time he was killed, or if what you know in relation thereto is information received from others.

Answer. I was not present. My information was received from others.

Cross-interrogatory 2. State when you last heard from T. A. Freeman before his death, where you were living at the time, and where he was living.

43 Answer. In the year 1892 I last heard from him. After that about a year Lennie received a letter from him. I was then living at Pulaski, Iowa, and he was living at Elma, Washington.

Cross-interrogatory 3. If in answer to interrogatory 3 you say that T. A. Freeman were husband and wife, state whether or not at any time you ceased living together, and whether or not you were divorced, and if so, when.

Answer. We ceased living together about 1887. We were not divorced to my knowledge.

Cross-interrogatory 4. State whether or not after the divorce of yourself and T. A. Freeman, if you were divorced, the said T. A. Freeman married again, if so, to whom, and how long prior to the time he was killed.

Answer. We were not divorced so far as I personally know, and I do not know personally that he was ever married again.

Cross-interrogatory 5. State what was the amount of the last contribution, if any, made by T. A. Freeman to Lennie Freeman, prior to his death, and how the same was made, whether in money or otherwise.

Answer. I think it was \$20.00 in money.

Cross-interrogatory 6. State how long prior to the death of T. A. Freeman it was since Lennie Freeman lived with him.

Answer. About 6 or 7 years. He visited her afterwards at Pulaski.

Cross-interrogatory 7. State, if you know, in what occupation or pursuit T. A. Freeman was engaged at the time of his death, and for some time before.

44 Answer. Lived on a ranch.

Cross-interrogatory 8. State how long before his death it was that you were separated from said T. A. Freeman, and how often you met him after you separated.

Answer. About 7 years and we had met once.

Cross-interrogatory 9. State whether or not you know of your own knowledge what T. A. Freeman actually earned from the time of your separation from him to the time of his death.

Answer. I do not know exactly.

Cross-interrogatory 10. Where have you been living since you separated, if you did separate from T. A. Freeman, and what have you been doing, and state whether or not Lennie Freeman has been residing with you, and you have been providing for her.

Answer. At Pulaski, Iowa; except about a year and a half in California. I have been engaged in dressmaking and millinery business most of the time. She has been residing with me, and I have provided for her except what her father furnished as herein stated."

"I, D. H. Payne, a notary public in and for Davis county, Iowa, do hereby certify that in pursuance of the annexed agreement came before me at Bloomfield, in Davis county, Iowa, Mrs. Nettie Hotchkiss Freeman, who was by me first duly sworn and examined, and such examination reduced to typewriting by me, who is neither of

45 the parties, their attorney, nor in anywise interested in the event of the suit, and after the same was taken by me read over to said deponent, and the same was subscribed and sworn to by the said Nettie Hotchkiss Freeman, and her deposition is now herewith returned.

Neither of said parties to the suit were present, nor was any attorney for either party present, nor any agent or other party present during the time thereof.

Given under my hand and seal notarial this 11th day of January, 1897.

D. H. PAYNE,

Notary Public in and for Davis County, Iowa."

Mr. F. E. TOMPKINS, a witness on behalf of the plaintiff, sworn, testified as follows:

Examined in chief by Mr. BRIDGES:

Q. Where do you live?

A. Elma, Chehalis county, Washington.

Q. How long have you lived there?

A. Four years.

Q. Are you acquainted with the surroundings of Elma?

A. Fairly well.

Q. Do you know where the railroad crosses the wagon road running to the east of Elma?

A. I do.

Q. Were you acquainted, during his lifetime, with T. A. Freeman?

A. Why, I met him in business quite often.

Q. You knew him, did you?

A. Yes, sir.

Q. You may describe to the jury as best you can, Mr. 46 Tompkins, the relation of this crossing about which I have asked you to the town of Elma, so they can better understand your testimony.

A. Well, we will start at the post-office and will say that the post-office is about the center of the town—that is, situated on the main street and on the right on one of the side streets leading to the Northern Pacific depot. From that point and to the east, I should say, it was eight blocks to the railroad crossing, but it would not be directly east, but would be one block north, then eight blocks east.

Q. Now, where were you, Mr. Tompkins, on the 29th day of April, 1895?

A. May I use my memorandum?

Q. Yes.

A. On the 29th day of April, 1895, we were building the Methodist Episcopal parsonage in the village of Elma. It is on the main street right east from the post-office toward the crossing, and I should say it was about in the sixth block from the post-office, east towards the railroad crossing, and on that day, on the 29th day of April, I was at work on this parsonage.

Q. Is this parsonage on the street or road that leads directly to that crossing?

A. No, sir; it is on the main street and is the next street north; it would be one street north of the road leading directly east to the railroad crossing.

Q. I will ask you whether or not on that day you observed the freight train coming in from the east.

A. I did; I saw the freight when it came in, when it came in.

Q. I will ask you whether or not you observed whether it 47 was giving any signals by ringing the bell or blowing the whistle at this crossing?

A. I didn't hear any; I heard no signals whatever.

Q. I will ask you whether you were in a position to hear them if they had been made?

A. Why, I think so, in a fairly good position; I was at work on the building, on the second floor of the building. The building that we were building was a story and a half high. The roof was not on yet, but the rafters were put on, but the rafters were all up and the sheeting on the rafters. The floor was just laid in place, the boards inverted in shape to stand on, so that we were walking

on the boards and working on this upper floor. We were pretty well up off the ground—probably, I should think, twelve feet off the ground.

Q. You may state what, if any, circumstances there were that led you to observe the train coming in on that day.

A. Working on that floor with me was the Reverend Mr. Gordon and also a man by the name of Chandler, and Chandler, or some one of us, I couldn't say just which one it was now, spoke of the train coming in passing the whistling post. The whistling post was not in sight, and we did not see the train until it got quite near to us, at the same time passing us around the bend beyond us like; and some one of them remarked that the train was coming in again, sliding in, or some such remark as that was made, without whistling again. I think we had been talking about it, and did talk about it at the time.

48 Mr. GROSSCUP: We object to any of the conversations there.

The COURT: Objection sustained.

Q. Go ahead without giving the conversation you had. Well, I will ask you, Mr. Tompkins, whether or not the conversations just prior to this had directed your attention particularly to the train, and that no signals had been given, without stating, of course, what the conversation was.

A. Well, I think we had this talk just about the time it passed the whistling post, or somewhere in that vicinity.

Q. Did you pay particular attention as to whether or not the train whistled or rung the bell?

A. Why, I didn't—I didn't hear it.

Q. Well, I asked you if you paid particular attention as to whether it did or not.

A. I could not say as I took any particular pains to note, but the fact that I didn't hear it was—

Q. How far away from this crossing were you, Mr. Tompkins?

A. Four hundred feet.

Q. About how far away from you was the whistling post; about how far, if you don't know the measurement?

A. Oh, I could not say very accurately; perhaps a quarter of a mile.

Q. Did you see the train that day before it reached the whistling post?

A. Yes, sir; I think I saw the train when it was crossing the railroad bridge that crosses the Coquitlum.

Q. Where is the Coquitlum crossing?

A. It is to the east of Elma.

49 Q. About how far from this crossing?

A. I should think it was a mile; perhaps a mile and a half.

Q. How far is the whistling post from the crossing?

A. I could not say.

Q. Well, as nearly as you can estimate it.

A. I should think it was a quarter of a mile. I suppose they

have a regular rule for setting it, whatever that might be, from the station.

Q. I will ask you whether or not you heard the whistle blow that day or the bell ring as the train came up to that crossing.

A. No, sir; I did not; I heard no signals at all.

Q. Now, did you see the deceased, Thomas Freeman, on that day, Mr. Tompkins?

A. Yes, sir.

Q. Where did you see him first?

A. Well, I think I had noticed him uptown that day at noon.

Q. I will ask you what was his condition as to sobriety?

A. Why, so far as I could see or know he was perfectly sober. I didn't do any business with him that day.

Q. Where did you see him next?

A. The next time I saw him to notice him was at a point, I should say, nearly west from where I was at work on that building.

Q. Under what circumstances did you see him there—was he walking or driving?

A. I saw him sitting in his wagon, sitting on the seat of his wagon and driving his team upon the road.

50 Q. On what road?

A. On this street right directly north of us—northwest; I think the street is called Young street.

Q. Was this the street that leads to that crossing?

A. Yes; it leads to the crossing.

Q. When you saw him how far was he away from the crossing—that is, how far from the brow of the hill from there?

A. Oh, somewhere between 250 and 300 feet, I should think; about two blocks; two ordinary blocks.

Q. I will ask you what he was doing when you saw him?

A. He was driving along the road, driving on down to the east on this street.

Q. When did you last see him?

A. I last saw him—I saw him at a point nearly east from where I was working on the building in this same road or same street at a point 150, somewhere from 130 to 150 feet from the crossing.

Q. Did you see him at the brow of the hill?

A. That was at the brow of the hill.

Q. That is the point that you are fixing then, Mr. Tompkins?

A. Yes, sir.

Q. And then you didn't see him after that?

A. I didn't see him after that.

Q. You didn't see him after that at all?

A. No, sir; and for the simple fact that there was a building that would shut off the view at that point. I should say rather that there were two buildings between us, a barn and quite a large
51 house. At the elevation that I stood I was over the other buildings, and I could see him over to that point, but I could not see farther on account of this large white house. I could see between the two buildings, the barn and the house, but after he passed that point he was shut off from view.

Q. Do you know whether or not in attempting to make that crossing he was killed by the train?

A. It was said that he was.

Q. Well, did you see him afterwards, and how long afterwards?

A. I saw him at the coroner's inquest. I didn't see him there at the crossing.

Q. You didn't see him over there at the crossing?

A. No, sir.

Q. Now, as the train approached the crossing did you hear any signals or any extraordinary noise made by the train as it came close to the crossing, any whistling or shutting off of the steam?

A. Well, I heard what I had reason to think was the shutting off of the steam of the engine and the closing of the throttle valve.

Q. Now, where was the train; that is, where was the engine, as near as you can get at it, from the crossing when the steam was shut off?

A. I should say that the engine had crossed the crossing.

Q. What has been your business, Mr. Tompkins, all your life since you have been in business?

A. Well, my chief business has been a carpenter, joiner, and builder.

52 Q. You say that Freeman was right at the brow of the hill, about 130 to 150 feet a-way from the crossing when you last saw him?

A. Somewhere near to that point.

Q. Now, can you tell the jury about where the train was, where the engine was from that crossing at the time that Freeman was at the top of the hill?

A. No, sir; I could not.

Q. You could not tell that?

A. No, sir.

Q. Now, you say that when the engine reversed you think that the engine was beyond and had crossed the crossing?

A. As I remember it not, I should judge that it had crossed.

Q. Was there any whistling at that time?

A. I heard no whistling.

Q. Did you hear any ringing of the bell at that time?

A. No; I didn't hear any.

Q. Were you at that time acquainted with that crossing and its surroundings?

A. I think I was fairly so.

Q. Have you made some examinations of that crossing since that time?

A. I have.

Q. Since that accident?

A. I have.

Q. I will ask you whether or not the crossing and all the surroundings along the railroad track south from the crossing are the same now that they were at the time of this accident.

53 A. I think they are, with the exception that there has been some brushes cut on the right of way near the track since that time.

Q. Where was that brush, Mr. Tompkins?

A. It was alongside of the railroad track, and at a point about 286 to 300 feet from the crossing, east and south. That would be down the railroad track.

Q. Well, was that the direction from which the train was coming?

A. Yes, sir.

Q. You were going west bound, were you?

A. Well, the train was west bound that day at that time.

Q. Now, if a person coming down at that time, at the time of the accident, Mr. Tompkins, a person going down that hill, could he see the train when he was 100 feet from the track?

Mr. GROSSCUP: I think it will be better for the witness to describe the position and situation of things there. This is rather a conclusion and a statement of the physical condition of things. I object to the form of the question.

The COURT: I think the question is too leading. The witness had better describe the ground. Objection sustained.

Q. You may describe that crossing, how it is immediately in front of the railroad track, and the opportunities of seeing one making the crossing and going down the hill, the opportunities one has of seeing and observing the train going westward, what points may be seen. Go into that matter fully.

A. The railroad, in coming up from the river bottom, comes up just a medium grade; it is not a heavy grade nor is it a very light grade; but in coming up onto the prairie on which the town of Elma is situated—the town site is on a kind of a prairie or second bench, a gravelly bench—and in coming up there they have graded out and excavated for their grade, and at the point they cross this street or road, I think that just at that point it is eight feet from the level of the prairie to the top of the rail, but a little farther down, of course, the prairie runs pretty nearly level, of course, and a little farther down, of course, it would grow in depth, as you follow down the track to the east and south as it comes in; and this wagon road or street, in crossing it at that point, is graded down to a level with the railroad track, with the top of the rail; this is planked over, as all the ordinary crossings are. And I found in measuring, as we measured along the road or street from the center of this crossing, the center of the track up the hill to the west, I found that the grade up 136 feet was about on a level with the prairie, but from that point down to the track, of course, it was carried down a true incline to the track. Of course, I didn't make any survey of it with any instruments, but that would be my opinion, that at that point it would be about eight feet. And the railroad track along there over this grade, running over this grade, making this raise upon the prairie, that ground there is gravelly as far as they have excavated, and I think they have used that dirt—the dirt that has been taken out of there was used in the fill below, and perhaps some of it has been carried on to other points. From the center of the track back to the bank I should think it was graded out about forty feet from the

track, but in passing down the track to the east and south the bank would come in to the track. I would come to a point here it was fill instead of cut on the right of way, and there, of course, the ground was kind of swung around on the track. It is not graded back as far as the height of the point, or I think had not been at that time. I think at that time it was pretty near where there were some bushes growing there.

Q. How tall were the bushes that were growing there at that time?

A. Well, it would be hard to say in the position that they stood as compared with the track, but I should think that they would run anywhere from eight to ten feet in height; perhaps some of them was higher than that.

Q. I will ask you whether or not these bushes at that time had leaved or not.

A. I could not say. I could not say as to that.

Q. In one going down that hill there what was the closest point one could see a train on the railroad track coming westward, when the train was, say, 250 feet down from the crossing under the conditions at that time?

A. Well, as I described this bank it was an undercut bank, I should say, 40 feet from the center of the track. Of course, at a point 40 feet from the center of the track on the west side of the track you could see down the track anywhere from 280 to 300 feet.

Q. From 280 feet, you think?

A. Yes, sir; to 300 feet.

56 Q. Were there any small bushes or anything else on this side of the large bushes, or any obstruction?

A. I could not say as to that. There is now at that point some small bushes.

Q. Do you know when this brush and these bushes were cut?

A. No; I do not know.

Q. Was it after or before this accident?

A. Well, I think it was after.

Q. Do you know how rapidly the train was running as it came in that day, Mr. Tompkins?

A. Well, I could guess, I think, and say just about what it was, I think, that would be all.

Q. You may state how rapidly you think it was running.

A. I should think 16 to 18, or possibly 20 miles an hour.

Q. Do you know how many cars there were attached to the engine?

A. I do not; I never counted them.

Q. You don't know how many there was at all?

A. No, sir; I do not.

Q. Where, Mr. Tompkins, is this man Shandler who was working with you that day on that parsonage?

A. He is dead.

Q. Do you know where the Reverend Jordan is at this time?

A. Well, I knew where he was at our last conference report. I do not know where he is now.

Q. Was he for a time at Elma?

57 A. At that time he was stationed at Elma.

Q. You say you knew where he was at your last conference report. Where was he at that conference report?

A. I think our last conference report gives him at Castle Rock.

By Mr. GROSSCUP:

Q. Castle Rock, Washington?

A. Yes, sir. Castle Rock, Washington, on the N. P. R. R.

By Mr. BRIDGES:

Q. Now, you may describe these oak trees, or scrub oaks, on the brow of that hill at that time, Mr. Tompkins.

A. That is up on the level prairie?

Q. Yes.

A. This prairie is dotted here and there with little white-oak growths, or little groves, and in under these white oaks and around the edges of them there is more or less of hazel brush growing, and this ground directly east of the parsonage is the church ground, and all along the south side of the street or road, even to the railroad crossing, is all unoccupied. It has not been improved, and that ground is covered more or less with these little oaks. In fact, at the east and south of this ground where the ground begins to break over to the bottom it is thickly covered with oak and more or less hazel brush around the edge of this oak grove, and that grove—well, it does not cover all the ground, but grows around here and there, like, so that at the point where the wagon crossing crosses the railroad track I should think before the excavating was done there that it was all white oaks chiefly. I think that there is little white

58 oaks standing quite near to the wagon road, and just immediately on the top of the bank above the railroad track, and they continue down to the bottom ground, down below the point where the railroad company began making their grade, the fill and cut, through this bank.

Q. I will ask you, Mr. Tompkins, whether or not these oaks and trees which you have spoken of would at that time obstruct the view of any one traveling on the street or road leading to the railroad track from the railroad track.

A. On that street that Mr. Freeman was going out on you could not see the railroad track, I don't think, from any point hardly on uptown. I do not think you could see the railroad track at all on the street he went out on.

Q. Well, now, I will change my question so as to read from the street if you could see a railroad train, instead of the railroad track.

A. Railroad train—that is what I thought you did say.

Q. Do you mean to say then that one could not see a railroad train at any point from town down to the crossing, traveling on that street that Mr. Freeman went out on?

A. Not on that street—well, you could not, I know, for any reasonable distance.

Q. For the purpose of locating a little more definitely where these

bushes and trees are, I will ask you where they are with relation to a man when he is standing on the brow of this hill.

A. Well, they would be right down the track from him.

59 Q. Down which way—the way the train was coming from on that day?

A. Yes, sir; that would be on the south and east of the line of the road, of the railroad.

Q. I will ask you whether or not they would obstruct sight of a train, or whether you could see a train from that position.

A. No, I don't think you could at all.

Q. I will ask you the relative position between these oaks, these white oaks of which you speak, and these bushes that have been cut since that time of which you have testified.

A. The bushes were east of these little oaks. They were between the little oaks and the track standing on the side hill leaning down to the track.

Q. Now, at the time this accident occurred what grade was this hill from the west side of the track?

A. What grade?

Q. Yes; how steep was the hill on the roadway?

A. Well, in a distance of 130 feet to 140 feet it would descend, I should think, eight feet—fully that much. I believe I stated that once before, that at that point.

Q. How far from the crossing to the north and west is this curve in this railroad track?

A. I could not say.

Q. About how far?

A. I should think it was 300 to 400 feet.

Q. And how far from the crossing is the railroad depot?

60 A. Straight from there, or taking the track as it runs there?

Q. Around the track, I mean.

A. At the point at the center of the main curve to the depot I should think it was anywhere from six to eight hundred feet.

Q. Do you know what direction the wind was blowing that day the accident occurred?

A. I don't think there was any wind at all that day. I don't remember of observing there was any wind anywhere around the building where we were working that day on that upper floor.

Q. I will ask you whether or not you had any conversation with any of the employees of the railroad at the time on the train there at the crossing or at the depot?

Mr. GROSSCUP: We would ask that the witness confine his answer to yes or no.

Q. Just after the accident?

A. I think I did.

Q. With whom did you have this conversation?

A. He was the man who goes over the line of road there on the Northern Pacific road. I suppose he is the track foreman.

Q. Do you know his name?

A. No; I could not swear to his name.

Q. Well, to the best of your knowledge what is his name--what name does he pass by?

A. He is known by the name of Jennings. I have no reason to know that that is his name, though.

Q. Now, you may state, Mr. Tompkins, what conversation
61 you had with this man about this accident and the cause of it.

Mr. GROSSCUP: That is objected to, if your honor please, as incompetent, irrelevant, and immaterial, and as hearsay testimony.

The COURT: I think that is inadmissible as hearsay. Objection sustained.

Q. Was this man, do you know, in the employ of the railroad company operating that line at the time?

A. Why, I don't know that he was for a fact, no, sir; I know he went over that line of the road, over the branch there--over that branch line of the road.

Q. Was he on the train on this day of the injury?

A. He was on the train that day, I suppose.

Q. No- you may state whether he said he was, in this conversation, that he was on that train that day.

Mr. GROSSCUP: That is objected to for the same reasons.

The COURT: Objection sustained.

Q. Now you may state what this conversation was that you had with this man Jennings.

Mr. GROSSCUP: Objected to for the same reasons.

The COURT: Objection sustained.

By Mr. HUDSON:

Q. I would like to ask you what was Mr. Freeman's opportunity that day as you saw him going down to the railroad crossing for observing a train coming up as that train was coming on that day.

Mr. GROSSCUP: We object to the question as calling for the conclusion of the matter which it is the province of the jury to determine from all the facts shown in the testimony.

62 The COURT: Objection overruled.

Mr. GROSSCUP: Defendant excepts.

The COURT: Exception allowed.

Q. With him going along down the road as you saw him in his wagon in the position that he was in, what was his opportunity for observing that train, taking into consideration the embankment that you have mentioned and the brush, and so forth, that you have testified to?

Mr. GROSSCUP: We renew the objection to this question, that it is calling for a conclusion of the witness.

The COURT: I think you have made the question too leading, and I sustain this objection.

Q. Well, I will ask you the first question as I asked it before. What was Mr. Freeman's opportunity on that day as you saw him going down to the railroad crossing for observing a train coming up as that train was coming on that day?

Mr. GROSSCUP: We object to that question on the same grounds stated when it was first asked.

The COURT: Objection overruled. Answer the question as best you can.

Mr. GROSSCUP: We except.

The COURT: Exception allowed.

A. I don't know hardly how to answer it.

Q. Well, are you familiar with the locality there, the surroundings and the position in which he was placed at that time, are you not?

A. Yes, I think so, fairly so.

Q. Well, state from that knowledge and answer the question I have put to you from that knowledge.

63 Mr. GROSSCUP: Same objection.

The COURT: Overruled.

Mr. GROSSCUP: Defendant excepts.

The COURT: Answer the question as to his opportunity of observing that train.

A. There is no doubt but what he could have seen the train at a point, say, when he was 40 feet from the center of the track; he could have seen the train at that distance, in my estimation, 300 feet—I think he could have seen the smokestack and the upper part of the train.

Q. But before he reached that point?

A. Before he reached that point?

Q. Yes.

A. I don't think he could have seen it any nearer at all under any conditions.

Q. Now, was there anything that happened—you need not state what it was—that caused you to observe whether that train on that occasion blew the whistle or rang the bell?

A. Please state that again.

Q. Was there anything on that occasion when you saw that train come up there to Elma that caused you to pay any particular attention to say whether or not that the train whistled or gave any signal at that time?

A. Well, just as I stated, our conversation, that called my attention.

Q. Well, state whether or not you paid any particular attention to that matter of the signal at that time.

A. Why, I could not say that I laid any particular stress
64 on trying to hear, but the fact that I did not hear it under the circumstances under which I was situated, being higher as I was, but I do not know anything further that I could say. I could not say that I laid any particular stress on the matter of hearing it.

Q. Now, can you say whether or not it did whistle or did not—say whether it whistled or not?

A. My opinion is that it did not whistle.

Q. It did not?

A. It did not.

Q. Are positive as to that? You have said that you did not hear it; now I want you to say whether or not it did whistle on that occasion.

A. I could only say then that I did not hear it.

Q. Now, with reference to these bushes that you have mentioned near the track east of the crossing. Please state whether or not the bushes were on the same side of the track from which Mr. Freeman was approaching the crossing?

A. Oh, why, yes, they were.

Q. State whether or not these bushes and that bank running out there over near the track as you have described it were obstructions to his vision looking down the way the train was coming.

A. It would be at that point.

Q. Did you go down to that crossing after this accident?

A. Yes, sir; I went down there.

Q. How long afterwards?

A. As quickly as I could get down.

Q. What was the condition of the wagon at that time?

65 A. Well, the wagon was broken and parts of it were all scattered upon the right of way along the track.

Q. Did you observe the tracks of the wagon at all?

A. I saw the tracks of the wagon.

Q. Now, will you state anything that you know with reference to the direction in which the wagon appeared to go just prior to its going onto this railroad track?

A. It was going across the track and right down onto the track.

Q. Well, was there any diversion from the main way?

A. It was about the crossing.

Q. Was there any diversion from the main way before it went onto the railroad track?

A. That is what I just stated.

Q. Well, what was it?

A. It was above the crossing, above the planking on the crossing.

Q. Well, now give the direction of the wagon, that the wagon seemed to take there and the horses—in other words, did they go out of the beaten way?

No answer.

Q. Was Mr. Freeman there when you got there?

A. No, sir; I did not see him there at all.

Q. He had been carried away?

A. Yes, sir.

Q. And the horses had gone also?

A. Yes; the horses had gone out towards their home, I suppose.

Mr. HUDSON: That is all.

66 Cross-examination.

By Mr. GROSSCUP :

Q. You say you observed the track of the wagon down the hill and up to the rails ?

A. Yes, sir.

Q. Now, from that track would you judge that he was driving on right straight across the crossing at the time the accident happened ?

A. It was not at the crossing ; it was above the crossing, to the west and north of the crossing.

Q. The wagon was ?

A. Yes, sir.

Q. But the tracks ?

A. The tracks is what I am talking about. I just said before that wagon was scattered around upon the track and upon the east side of the track.

Q. How close to the railroad crossing was it before the track of the wagon appeared to jump from the regular traveled road ?

A. I could not say ; I think the tracks are there today, or was there a short time ago, perhaps. That is the tracks that was made by the engine striking the wagon and the tire of the wagon cutting into the ground.

Q. What I mean is from these tracks at what point in the roadway would you judge the wagon was when struck ?

A. It was above the crossing.

Q. Above the center of the crossing ?

A. It was above the center of the crossing, north and west, when the engine struck it.

67 Q. When the engine struck the team ?

A. Yes, sir ; that is, the team was not trying to cross on the crossing, but were crossing in the right of way between the cattle-guards, and they were above and north of the planked crossing.

Q. Now, you say this right of way of the railroad track is cut out on the side from which Freeman was approaching a distance of about forty feet of the bank ?

A. I should judge it was about forty feet.

Q. Have you measured that in connection or association with some other gentlemen ?

A. I have measured it in the road.

Q. Did you ever measure forty feet from the railroad track into the road ?

A. In the wagon road ?

Q. Yes.

A. Yes, sir.

Q. And from that point did you make any observation down towards the direction from which the train was coming ?

A. I did.

Q. How far could you see in that direction an object as high as a locomotive ? I will ask you how far you could see an ordinary man ?

A. An ordinary man there at this time—I could stand at a point forty feet from the center of the track up this grade and I could see a man down to the top of his shoulders at six hundred feet down the track.

Q. At this time 600 feet down the track?

A. Yes, sir; at this time, at the present time.

Q. Now, you spoke of there being projections out towards the railroad track at two or three hundred feet from the crossing?

68 A. Yes, sir; the bank drops below the grade of the track.

Q. In other words, between those two points on the railroad track has been a gravel bed when the railroad was built?

A. Yes, sir; I think such is the fact.

Q. Well, there were no high bushes in that gravel pit, were there?

A. No, sir; not right in the gravel pit.

Q. Has there ever been any there in that gravel pit?

A. I don't think there ever has been.

Q. How many years has that railroad been built down there?

A. About five or six years.

Q. Now, how close did the bushes at the time of this accident on this ridge at this place where the gravel pit died out approach to the track?

A. Well, I could not say how close the small bushes grew to the rail, but I should say eight to ten feet.

Q. Eight to ten feet?

A. Yes, sir.

Q. How much farther back were the large bushes?

A. Well, I think there were a part of the large bushes were growing at a point of ten feet.

Q. From the outer rail?

A. From the outer rail next to the bushes.

Q. That is the rail next to you?

A. Yes, sir.

Q. Well, how high were these small bushes that came up to within ten feet of the grade?

A. Oh, I think they would — anywhere from six to ten feet.

69 Q. So that you could see a locomotive right over them?

A. Well, I do not know about that. I never had any occasion to see one.

Q. Well, a locomotive is about twelve feet high, is it not?

A. I should judge that it was.

Q. Well, if a locomotive was twelve feet high, and if you were to stand forty feet back from the track, do you not think you would be able to see a locomotive over these small bushes?

A. I could not say.

Q. You are not able to say as to that?

A. I am not able to say as to that because I never had any occasion to look.

(Papers marked for identification, Defendants' Identification 1 and Defendants' Identification 2.)

Q. How fast was Mr. Freeman driving when you saw him at the top of the hill?

A. The team was walking along, as I remember it at the time, an ordinary walk for a team.

Q. Would you think that it was walking at the rate of three miles an hour—that would be an ordinary walk for the horses?

A. Yes, sir; I should that it was an ordinary walking gait.

Q. Would you think about three miles an hour?

A. Possibly anywhere from three to four miles an hour; just an ordinary walk, I should think, as I remember it now.

70 Q. And you think that the train was going at the rate of about sixteen miles an hour?

A. Sixteen to eighteen or twenty; maybe only twelve. Of course, I could not tell.

Q. That is a pretty hard thing to tell, isn't it?

A. I could not tell exactly, no.

Q. Now, you are a carpenter and accustomed to figures—if the train was going say—would you say that eighteen miles an hour was a pretty liberal estimate for the speed of the train?

A. I should think it was.

Q. And three miles an hour would be a moderate for the speed of Mr. Freeman, would it?

A. Perhaps, somewhere relative to that.

Q. So that the train would be going about six times as fast as Mr. Freeman according to that?

A. Yes, sir.

Q. Now, if that was the relative proportions of Mr. Freeman and the train, how far down the track would the locomotive be at the time that Mr. Freeman was forty feet from the track, supposing that the locomotive was going six times as fast as the horses?

A. It would necessarily be three times the forty feet.

Q. It would be six times as fast if the train was going six times as fast, wouldn't it?

A. Yes, sir; it would be 240 feet.

Q. Now, then, if the relative speed of Mr. Freeman and the locomotive was what we have just figured it, would Mr. Freeman
71 have had any trouble at all in seeing the locomotive when he was approaching to within forty feet of the crossing in this open cut, at the point where he reached the open cut?

Mr. BRIDGES: We object to that, your honor. It is asking the witness to draw a conclusion, and this is a very leading question.

The COURT: He has a right to put direct questions on cross-examination. The objection will be overruled.

A. Why, I should say not.

Q. Let me show you Defendants' Identification 2. I will ask you if that is a correct photograph of the rear end of a train, taken with a camera distant from the center of the railroad track pointed at the direction of a train, the rear end of which was 300 feet from the track.

A. I don't think it is correct.

Q. In what respect is it not correct?

A. From the fact I don't think it is 300 feet from the center of the crossing to the back end of the cab.

Q. You don't know that it is not?

A. I don't think it is, otherwise the lay of the ground and the railroad track is just as it is, I should say, so far as my memory serves me.

Q. Do you observe the second telegraph pole from the road?

A. I see the second one here.

Q. Do you know the distance of telegraph poles from each other on that railroad track?

A. No; I can't say that I do.

72 Q. Now, do you observe in the photograph the projections of the ground that you have spoken of down towards the end of the track?

A. Yes, sir; I think I can see that point of ground, and can see it in my mind as it is now.

Q. Is that a correct representation of that point of ground?

A. I think it is.

Q. Now, at that point of ground, just beyond the second telegraph pole is the point of ground referred to, that was three hundred feet from the crossing?

A. Yes; but I want you to understand that I do not say that this is a photograph as it was then. This is a photograph as it is today; not as it was two years ago.

Q. Well, never mind that, we will concede that, Mr. Tompkins, but the point of ground was at the same place that it is now?

A. Yes, sir.

Q. And that point of ground two years ago, the same as now, was the first obstruction looking down the track?

A. Yes, sir; I should think it was.

Q. That was 300 feet away?

A. About that.

Q. Did you count the ties or the rails yourself?

A. No, sir.

Q. But you would judge that it was about 300 feet?

A. I measured it with a tape-line.

Q. And did you find it then to be about 300 feet?

A. No; I think the exact measurement is 286 feet.

Q. 286 feet?

A. Yes, sir.

Q. Very well. You think there is no question about seeing a locomotive some feet beyond that?

73 A. Yes, sir, certainly I could see a locomotive some feet back of that.

Q. And you could two years ago with the bushes there as they were?

A. Yes, sir; I think I could see the smokestack and the sand dome, and so forth.

Q. Now, what was the speed of Mr. Freeman—what was his position in the wagon when you saw him on the top of the bank?

A. He was sitting on a low seat—I don't know as I could say what kind of a seat it was, but as I remember it now I should say it was just merely a board across the top of the box; the box was a single box. I know it never had the top box on, but was a single or first bed box. He had a board, I think it was now, although it may have been a seat. I don't think there were any springs under it, but that it was lying across the box and he was sitting on that.

Q. What was the position of his body, as you observed it?

A. Well, as I saw him he apparently was sitting not directly straight in the box; perhaps kind of across the end of the box. I think with his side to the wheel and the seat was pretty well up in front.

Q. You say he was sitting across in a kind of a side position?

A. Yes, rather diagonally across.

Q. In a kind of a diagonal position.

A. Yes, sir.

74 Q. If he remained in that position which way was his back, then, with reference to the way the train was coming?

A. Well, it would be a kind of a quartering position.

Q. With his back partially towards the train?

A. Yes; rather with his right shoulder towards the train.

Q. With his back partially to the train, it would be, would it not?

A. Well, somewhat.

Q. He would be unable then to see but one-half—he would be half towards the train?

A. Yes; but of course the road does not cross the track just exactly at right angles there. I think the angle would be open there rather than closed.

Q. If he was looking straight ahead in the position in which he was sitting would he be looking at right angles to the track?

A. No, sir.

Q. Or would he be looking somewhat up the track in the opposite way from which the engine was coming?

A. If he was looking right beyond the team along the line of the road of course he would be looking in that direction, but it would be somewhat over his shoulder, I should judge.

Q. In other words, his back was somewhat in the direction the locomotive was coming?

A. Well, it would have a tendency to throw it that way.

Q. You say that the grade there would be about one per cent., you think?

A. The railroad track?

75 Q. Yes.

A. I could not say what the grade is.

Q. It was up grade?

A. Yes, sir.

Q. And this was a heavy train?

A. Well, it was heavier than they usually had been pulling over the road, I think.

Q. Did you have any difficulty in hearing the train that day yourself?

A. I could hear the train from where I was on the building.

Q. What distance did you hear it?

A. I think I heard it from the bridge, from the time it crossed the bridge.

Q. You heard it then clear from the bridge to the crossing?

A. Yes, sir.

Q. How far is the bridge from where you were—about how far? I don't care for the exact distance.

A. Perhaps three-quarters of a mile.

Q. So that you heard the train three-quarters of a mile away?

A. I think I did; I think that I did hear it.

Q. And you continued to hear the train clear up to the time it crossed the crossing?

A. Yes, sir.

Q. Was it working steam in an unusual way for a train coming up grade?

A. Why, I suppose it was; I didn't observe it.

Q. You didn't observe it?

76 A. It was running very fast; of course they would have to have—I think it would be so fast you could hardly distinguish the cut-off.

Q. Was it emitting smoke?

A. Yes; quite a good deal of smoke. I should think the train was running as a train ordinarily would at that speed and up grade.

Q. What kind of a day was it?

A. It was a still, warm day.

Q. Clear?

A. Yes; I think it was a clear, bright day.

Q. And wind?

A. I don't think there was any wind to speak of that I noticed.

Q. If a man was listening on that road at any point along from time that he left the point opposite the point where you were working down to the railroad track, would he have had any difficulty whatever in hearing that train in your judgment?

A. Why, I think not, if there had been no noise or any other sounds he could have heard it.

Q. If he had stopped his wagon and listened he could have heard it?

A. I should think he could; we had no difficulty in hearing; we heard it.

Mr. GROSSCUP: That is all.

Redirect examination.

By Mr. LINN:

77 Q. Let me ask you whether the obstructions you speak of being between the road that Mr. Freeman was driving along the railroad track, existed as between him and the train at the time of the accident were the same obstructions that there were

between you and the train—were the obstructions that were between him and the train the same that were between you and the train?

A. Yes, sir; the same obstructions, but there was a curve in the track which was directly east of him; with that exception they were the same as between Mr. Freeman and the train.

Q. State whether or not you know at what point on this road Mr. Freeman was at the time the train crossed the bridge; do you know where he was at that time?

A. No, sir; I do not know.

Q. You don't know where he was?

A. No, sir.

Q. State whether or not you know whether a man can hear that train in that cut after he starts down from the brow of the hill as easily as he could at that point you were or not.

A. Whether I know?

Q. Yes.

A. I could not say that I know.

Q. State whether or not in your judgment from the formation of the ground there that he could hear, whether he could in your judgment hear as well as where you were.

A. I think that would be quite impossible as a natural consequence that he could not.

Q. Do you know whether this train was running on time or not?

78 A. I think the train was behind time.

Q. Do you know about how much?

A. I do not. I don't remember the schedule time, nor I didn't take any note of the time at the time of the accident.

Q. Let me ask you, Mr. Tompkins, whether a train running up a grade at a rapid rate of speed makes as much noise as it does on an ordinary level grade—whether it makes as much noise running up-grade, as it is at this place.

A. I could not say as to that; I could only give my opinion.

Q. I will ask you whether or not a train on an upgrade with the couplings all drawn taut, with the engine pulling, makes as much noise as where it is running on the level with the couplings all loose and shaking?

Mr. GROSSCUP: I object. The witness says he don't know.

The COURT: Objection sustained.

Examination of Mr. Tompkins closed.

Mr. ABNER SOMMERS, a witness for the plaintiff, sworn, testified as follows:

Examination-in-chief.

By Mr. BRIDGES:

Q. State your name.

A. Abner Sommers.

Q. Where do you live?

A. I live in the village of Elma.

79 Q. Where did you live in the spring of 1895?

A. I lived just this side of Elma, down on what is known as the French farm, where the Youngs used to live.

Q. Do you remember the day upon which Mr. T. A. Freeman was killed at the railroad crossing near Elma?

A. I don't remember the day, I remember the time, but I don't know what date it was.

Q. Do you remember that day that he was killed?

A. Yes, I remember the day when he was killed. I don't know the date of it, though.

Q. Where were you at that time—did you see the train coming in on that occasion?

A. I saw the train down about the hollow where the trains sometime cut in two to run up the grade there. I saw the train as she come onto the crossing and before she got onto the crossing.

Q. Go on and state all you know about it, where you were and how far the train was from the crossing when you first saw it.

A. Well, I first saw the train as it came across the bridge. I was about half the length of the train below the crossing, down below the whistling post.

Q. Where did you first see the train?

A. I saw it come across the bridge.

Q. What bridge?

A. The bridge across the Coquitlam.

Q. You say that you were close to the whistling post?

A. Yes, sir, I think I was about half the length of the train—about half the length of her.

80 Q. You were on the right of way?

A. Yes, I was along close up to the fence. I got up there to let the train go past me—I never like to stand close to her when she goes past, and I got up there to let her go by. I thought she would cut in two there and I would get a ride in—I have seen her do it lots of times—

Q. What were you doing there?

A. I got out of the way of the train, I said. I had been fishing down in the creek and was going home. I got up onto the side close to the fence there to let the train go by.

Q. Did you hear the whistle of the train?

A. She never whistled.

Q. She never whistled?

A. No, she didn't whistle.

Q. Did you hear the ringing of the bell?

A. She never rung no bell, neither.

Q. Did not the bell ring for the crossing?

A. No, sir, it never rung.

Q. Was your hearing then as good as it is now, Uncle?

A. Yes, just as good and better—it gets worse all the time, though.

Q. Did the train whistle any place between the whistling post and the crossing?

A. She never whistled until she got right below the depot.

Q. Did the bell ring any place between those two points, the whistling post and the crossing?

A. No, sir; I never heard her whistle or ring the bell
81 until she passed the top of that little crossing below town.

Q. Where did the train stop—did it stop at the crossing?

A. It stopped, I think, about 150 yards after it passed the crossing.

Q. After it passed the crossing?

A. Yes; after she struck the wagon.

Q. Did you see it stop there?

A. Yes, I saw it; what made me pay so much attention was I was going to ride up on the caboose—I had intended to ride up on the caboose was what I expected to do, to get on the hind part of the train when she cut in two—she sometimes cut in two to get up that grade there—

Q. Why did you say you expected that?

A. I have seen her do it lots of times there—they would run up to about the whistling post and then cut her in two, and if they done that I intended to get on the cab and ride up on her, but she didn't do it this time. I have rode in on her before.

Q. Did you go up to the crossing?

A. Yes, sir; I went on up there as fast as I could walk.

Q. What did you see when you got there?

A. I saw the hind part of a wagon knocked across the cattle-guard, knocked through the fence—I think it broke the fence with the wagon, and I saw a lot of the goods scattered all around there, the stuff he had in his wagon, groceries, canned goods and such, and I saw the fragments of the front part of the wagon, some of the spokes of the wheels, and such.

82 Q. Where were the horses?

A. They had gone off along towards the road; I don't know where they was gone when I got there.

Q. Did you observe—did you see Freeman on that day as he drove down to the track?

A. I didn't know Mr. Freeman—never saw him in my life that I know of—may have seen him hundreds of times, but I didn't know him.

Q. Did you observe whether or not the train struck the wagon when it was straight across the railroad track in the middle of the crossing?

A. No, sir; the horses had shied out a little to one side and the engine had struck the wagon and knocked it off the ground. The horses had shied out, just like horses will when they saw the engine a coming, and the wagon was throwed to one side of the track when it was hit. There where they had jumped to one side they had scraped up the ground where they struck. They was off to one side of the cattle fence—had got part way across probably. They had jumped clean across and the engine had struck the wagon somewhere about the middle; it was part way across.

Q. How far back was it where the horses had commenced to shy off?

A. Six or eight feet back from the side of the track. There was the tracks where the horses had shied off and the wagon cut into the ground, and when the engine struck the wagon it knocked the horses loose, knocked one of them over on the other side of the cattle fence, tore the harness off of them, and one of them was
83 knocked on the other side of the cattle-guard, and one of them stood right up against the fence. The fore part of the wagon was about fifty yards, something like that, up the track, some of it, the fore wheels and part of the spokes out of the wheels where the engine had carried it, some of the fore wheels were scattered all along there for a good piece—pieces of them.

Q. Was there anybody else there at the time you got there?

A. Yes; there was some women there and probably a man or two had got there by the time I got there. I don't know how many there were there then. I gathered up some of the things that laid around there and laid them back in the wagon box that stood there, some of the groceries he had in his wagon that was throwed around there.

Q. How far back do you think the wagon left the main-traveled portion of the road where you say the tracks showed it had left?

A. Well, it was a little more than six or eight feet, maybe, where they had shied off. That was where the horses took right onto the track to go across. It looked like they had jumped out of the way of the engine first and then had jumped right across in front of it, across the track and onto the other side.

Q. Now, do you know whether or not the condition of the road with relation to its having bushes upon it is the same there now as it was then?

A. Oh, no, it is not, they cut them off afterwards.

Q. Where were these bushes?

84 A. There was a little clump of gravel that they didn't take out when they were tearing up the ground there to build the road, and it runs right down pretty near to the road. It is right on the direct line of the main street and the railroad it comes the next street back. Those bushes grewed in there in that spot close up to the road on that point where there had been some digging done, close to there, where they built the road.

Q. How tall were these bushes in there, do you know, Uncle?

A. Oh, some of them were eight and ten feet high, and they were pretty thick, too, some vines among them, and there was some hazel bush and grape vines among them, all grown up there in a little thicket, like. There was some berry vines grown up amongst the bushes—

Q. Do you know whether the leaves were on the bushes and trees at the time of this injury?

A. I think there was some of the leaves on them at the time.

Q. Were you very often near this crossing and this whistling post, Uncle?

A. Oh, yes; quite often; I have to pass that way to go down to town and down home—I have been there a good many times when she didn't whistle—

Q. Do you know whether or not it was the custom to whistle at that point?

Mr. GROSSCUP: Objected to, if your honor please, as incompetent.
The COURT: Objection sustained.

85 Q. How rapidly was the train going that day, Uncle?

A. I don't know how many miles an hour she was running, but she was going at a pretty good rate of speed.

Q. You don't know how many miles an hour, though?

A. Oh, no, I don't know how many miles she was going, only I know when she has got her steam up pretty strong. I don't know how many miles an hour she was going.

Q. Was it making a great deal of noise?

A. Oh, no, not a powerful lot of noise—she was running and puffing right smart to get up the hill.

Q. Had it struck the grade, the up grade, when it passed you?

A. I think it is a little up grade, but I don't think it begins to strike the up grade until it gets up to that cut, after they get to that curve. There is a switch, I think, just above that place where they struck the wagon, and when they strike that switch, and then they strike the curve. I think that is about where they begin to strike; the heavy grade is when they get around the curve. There is where they cut the train and let the back part loose, let the hind part run back onto that switch. That is what made me think they would cut her in two and make that switch, and I could get to ride up.

Q. Do you know whether or not the train was on time that day?

A. No, I never kept no account of the time—I don't know whether she was on time or not.

Q. You don't know anything about that?

86 A. No, sir.

Q. Do you know what time it was when the train got there that day, what time this accident occurred?

A. No, I could not say what time it was, only I know it was in the evening, afternoon, but I don't know what time it was. I was going home in the evening is all I know.

Q. Do you know whether or not there was any wind that day?

A. I think there was a little west wind.

Q. You think there was a little wind blowing from the west?

A. Yes, sir. What makes me remember that so was me swinging my line, and that the wind was blowing a little from the west.

Q. Do you say that the wind was blowing from the west?

A. Yes, sir, from the west. It was not a strong wind, but there was just a slight breeze blowing.

Mr. BRIDGES: Take the witness.

Mr. GROSSCUP: No cross-examination.

Examination of Mr. Sommers closed.

Mr. A. H. BALDWIN, a witness for the plaintiff, sworn, testified as follows :

Examined in chief.

By Mr. BRIDGES :

Q. Where do you live?

A. I live in Elma, Chehalis county, Washington.

87 Q. How long have you lived there?

A. I have lived there a little over four years and a half.

Q. Were you acquainted with T. A. Freeman during his lifetime?

A. Well, I knew the gentleman when I saw him, that was about all I knew him. I never was intimately acquainted with him.

Q. Where were you on the 29th day of April, 1895?

A. I was in the hop yard known as the Dr. French hop yard, near Elma.

Q. Where is that with relation to the railroad crossing in question here?

A. Well, it is about half way between the whistling post and the crossing east on the railroad.

Q. And how far from the railroad were you?

A. I was between five and six hundred feet.

Q. Did you see the freight train come in on that day?

A. I did.

Q. I will ask you whether or not you were watching it as it came in?

A. Yes, sir; we stopped to look at the train go by.

Q. Did it whistle at the whistling post?

A. No, sir.

Q. Did the bell ring?

A. No, sir.

Q. Did it whistle at any point between the whistling post and the crossing?

A. Yes, sir.

Q. Did the bell ring any place along there between the whistling post and the crossing?

A. I didn't hear it.

88 Q. How rapidly was the train going, would you say?

A. I should judge between fifteen and twenty miles an hour—I would not want to say positive.

Q. Where did the train stop?

A. Well, she stopped right at the crossing, as near as I could get at it.

Q. Which portion of the train was nearest to the crossing when she stopped?

A. Well, it was about at the crossing——

Q. Which portion of the train?

A. Nearest the crossing——

Q. Where was the caboose?

A. Well, the caboose was just inside the cut, about two cars inside the cut.

Q. Where was the caboose with relation to the crossing, I mean the wagon-road crossing—where was the caboose with relation to that crossing?

A. The caboose was on the south side.

Q. How far from the crossing?

A. Well, I could not tell exactly; I do not know how many cars there were across the crossing.

Q. Do you know how many cars there were in the whole train?

A. No, sir; but I should judge there were about ten or twelve cars, but I would not be positive.

Q. Were you accustomed to see that train on that road, the train that was running on that run?

A. Yes, sir; while I was working there in that hop yard I was.

89 Q. I will ask you whether or not this was the customary train, or whether it was an unusually large train for the train that was on that run on that day.

A. No, sir, while it was a little larger than some of the trains, yet I think it was about an average train, I should judge.

Q. Now, did you go up to that crossing when Mr. Freeman was run over there that day?

A. Yes, sir, we went up, but the train was gone when we got there.

Q. The train had gone before you got there?

A. Yes, sir.

Q. What did you find about what had happened? Describe it to the jury just what you found there about the accident.

A. Well, I found a wagon all torn to pieces and jars and groceries and such like as that all scattered around there.

Q. Where were the horses?

A. The horses, one of them, was tied up down by the creek, and the other one was tied to the fence—

Q. They had left there then?

A. Yes, they had left there and had been tied up.

Q. Now, do you know whether or not the wagon had left the main or usual traveled road, the portion of the road that was the main traveled?

A. Yes, sir, it had.

Q. Before it reached the railroad track?

A. Yes, sir.

90 Q. About how far back from the railroad track had it left the main-traveled portion of the wagon road, or about how far?

A. I should say that it was about twenty feet back from the track where the tracks of the wagon appeared to have left the main road.

Q. About twenty feet back?

A. Yes, sir.

Q. Twenty feet back where it had left the main portion of the wagon road, the main-traveled portion of the road?

A. Yes, sir, about twenty feet from the crossing is where they started to run off the road.

Q. Had the wagon crossed or attempted to cross the railroad track on the crossing or on the usual traveled portion of the crossing, or was it to the north of it or otherwise?

A. It was to the north of the crossing.

Q. Still within the right of way of course, was it?

A. Yes, sir.

Q. How do you know that?

A. Well, I have lived around there and I know the road, and I seen the wagon there that day and happened to notice it, is how I know it.

Q. Was there any peculiar conditions there to indicate where the wagon was on the track when it was struck?

11 A. Well, the forward wheels were right in the center of the track as near as I could get at it, and the hind wheels had scraped the dirt along so that there was marks where it run onto the track.

Q. Now, what was the condition of that hill at the time of this accident as to whether it was level or gravelly or sandy or otherwise?

A. Well, there was sand and dust on it at that time.

Q. Were there any rock or boulders in the road-bed?

A. Well, it was just common gravel and clay covered with this dust and sand.

Q. Now, do you know whether or not there were any obstructions to the view of the railroad of a person coming down the hill onto that crossing from Elma?

A. Well, at forty feet from the center of the track a fellow would be able to see about 250 to 300 feet down the track.

Q. Why could he not see farther?

A. Well, there was a bank and some bushes that kind of hung over the top of this bank; they kind of swung over the bank, so that one could not see any farther.

Q. How close would one have to get to the track before he could see farther than 250 to 300 feet down the railroad track?

A. About twenty-five feet.

Q. Well, how tall were these bushes and this brush down there you speak of?

A. Well, the hazel brush, I presume, is about eight or ten feet high, and the mulberry bushes and the blueberry bushes, I should judge, was six and seven feet high. They were down towards the railroad more.

Q. Down towards the railroad track you mean?

92 A. Yes, sir.

Q. Was it those that obscured the view?

A. Well, the hazel bushes on the bank also would obscure the view.

Q. You may describe briefly these oaks where they were with relation to this crossing and these bushes?

A. How far from the railroad?

Q. Yes; where they were located, so that the jury can understand.

A. Well, they were on the point—these groves were on Mr. Byles's place and right up to the right of way, about 100 feet back and going down to within ten feet of the road, it was all grown up with grub oaks.

Q. What kind did you say?

A. They are a kind of grub oak, they are called.

Q. When were these bushes cut, after or before this accident?

A. It was about two or three months afterwards, I think.

Q. After this accident?

A. Yes, sir; that was the first that I noticed them being cut, was about two or three months afterwards. I don't know just when they were cut.

Q. Well, do you know who cut them?

A. I could not swear to it; no, sir.

Q. You did not see them cut?

A. No, sir; I did not see them cut at all, and didn't know they were cut until I happened to notice that they had been cut.

93 Q. Now, did you hear the train making any unusual noise at or near that crossing on that day?

A. Well, not until she got right at the crossing.

Q. What was it you heard there?

A. Well, I heard just about the time she was right at the crossing as near as I could get at it I heard the cars jamming up.

Q. You heard the cars jamming up?

A. Yes, sir.

Q. That was about the time the engine must have been right on the crossing, you think?

A. Yes, sir.

Q. What direction was the wind blowing that day if there was any?

A. From a westerly direction.

Mr. BRIDGES: Take the witness.

Cross-examination.

By Mr. GROSSCUP:

Q. Mr. Baldwin, you say that when you get to within forty feet of the track on the side from which Mr. Freeman was approaching that you can see down the track in the direction that the train was approaching two hundred to three hundred feet?

A. Yes, sir, I think I said two hundred and fifty to three hundred.

Q. Do you remember what kind of a day that was?

A. Well, it was a light wind.

Q. It was a clear day, practically?

A. Yes, sir, I think it was as near as I can recollect.

94 Q. A man on that day would have had no trouble in seeing 250 to 300 feet, would he?

A. No, sir.

Q. If a man were in a wagon, an ordinary farm wagon, sitting on the seat at a distance where that bank breaks off at 40 feet from the

railroad track, and he was looking in the direction from which the train was coming, how far down that track do you think he could have seen that train on the day on which Mr. Freeman was killed?

A. Well, I don't know, because I was never in a wagon to notice coming down the hill, and I could not say positively.

Q. How far do you think he could have seen from your observation?

A. Well, I think that he could see a little farther than a man could who was walking, but I do not think he could see very much farther on account of about 300 feet is where this small brush is.

Q. Well, he certainly could have seen a train 300 feet up the cut, could he not?

A. I think he could.

Q. At that time?

A. Yes, sir.

Q. And on that day?

A. Yes, sir.

Q. Now, at 25 feet from the track how far could he have seen the train coming?

A. Well, he could not see much farther, of course he could see a little farther, but not very much, because it is almost a tangent there for quite a little ways.

Q. You are accustomed to seeing the trains pass, are you not?

95 A. Yes, sir; I have seen them frequently.

Q. And have some idea of trains, have you?

A. Yes, sir.

Q. What would you put the speed of that train at on that day?

A. Well, I would not say positively, but I thought it was going between fifteen and twenty miles an hour. I could not say that it was as much as twenty, or that it was any more than fifteen. I do not think that it would exceed those figures either way.

Q. You would put it, then, between fifteen and twenty miles an hour?

A. Yes, sir.

Q. How is this road at this crossing—what is the character of the road there—how is it?

A. Well, it is upgrade on both sides of the crossing.

Q. I mean the traveled road there—the wagon road?

A. That is what I mean; it goes down to the track on one side and up again on the other. That is what I call an upgrade on both sides of the track. The track is down in the valley.

Q. How is it as to being a nice smooth road along there?

A. It is a pretty nice road.

Q. Was it at that time?

A. Yes, sir; it was dusty.

Q. But it was a good smooth road?

A. Yes, sir.

Q. And how wide is it?

A. Well, about the width of a wagon, six feet or something like that—that is, where the main travel is.

96 Q. Was it not wider than that where it was possible to travel?

A. Oh, yes, sir; I should think so.

Q. How wide was it possible to travel in?

A. Well, you can travel until you get down to the crossing for the whole width of the road of sixty feet. The road is sixty feet wide, and it would be possible to travel anywhere in that space, but the main-traveled track is about six feet wide, I should think, just the ordinary width of a wagon road.

Q. Could a team turn around in it, do you think, in a pinch?

A. Yes, sir.

Q. In other words, as you observed things there that day, Mr. Baldwin, if Mr. Freeman had looked in the direction from which this train was approaching when he came out on that bank, could he have turned his team around so as to have avoided this accident, if he had tried to do so?

A. I don't quite understand you.

Q. Well, if Mr. Freeman had looked from the point where he came out down the track 300 feet, could he have seen the train or the engine—would it have been possible for him to have turned his team around there in the road?

A. Why, I could not say where they were going at that time.

Q. But could he not have turned the horses—suppose they had turned off, suppose he had seen the engine and turned them off, could he not have turned the team around in the road there?

97 A. Well, I guess he could—I think that I could have turned around in there myself. I don't know whether he could or not.

Q. You think that any fairly good driver could have turned in there, do you not?

A. I don't know.

Q. You do not know how fast he was going, do you?

A. No, sir.

Q. Now, you say that these tracks show that he went straight ahead up to within about 20 feet of the railroad track?

A. Yes, sir.

Q. And then turned off?

A. Yes, sir.

Q. How far had he turned off the main-traveled road from the point where the engine struck the wagon?

A. Well, it was about six feet off from the edge of the crossing—that is, the wheels next to the crossing, the south wheels, would not be six feet from the north end of the crossing.

Q. How far out of the main-traveled road—how far, in other words, from where he would have crossed if he had gone straight ahead?

A. That is six feet off to one side of the crossing—that is, one wheel.

Q. Suppose that the crossing went along across and he was within six feet when his horses shied off to go across?

A. Yes, sir.

Q. You say that the train was making considerable noise when it passed you?

A. No; no unusual racket.

Q. How far did you hear it?

98 A. Well, I heard it from the time it crossed the Mox—bridge?

Q. How far away is that from where you were?

A. Well, that was—it lacks a few feet of being a mile.

Q. So you heard the train approximately a mile away?

A. Yes, sir, I heard it crossing the bridge.

Q. You were 600 feet you say from this crossing?

A. About that.

Q. Do you think that if a person had stopped and listened at the top of the hill and at the top of the grade coming down to the railroad crossing there he could have heard that train—if they had tried, a person with good hearing?

A. I do not know—I presume they could.

Q. You think they could?

A. Yes, sir, I think so.

Mr. GROSSEUR: That is all.

Redirect examination.

By Mr. BRIDGES:

Q. What was the condition, the character of the country back there by that creek on that bridge where the road enters the cut, up to the point where it enters the cut?

A. Well, I should judge from the crossing down to the curve would be about a quarter of a mile, and then it goes southeast until it gets across the bridge, and then it goes due south.

99 Q. What was the condition of the country as to being a broken country, is it hilly, or level, or low over this ground you have spoken of?

A. It was level between the bridge and myself until it reaches the fill, and then there is the foot bridge on this bridge. I was up in the field back from the track a little ways.

Q. You say it is level and low up to a point of this cut where this crossing is?

A. Yes, sir; that is a fill on the railroad track.

Q. I will ask you whether or not the field in which you were working was bottom?

A. Yes, sir.

Q. I will ask you whether or not it was beneath and lower and under this ridge which formed this little hill about the crossing?

A. It was just at about the foot of the hill.

Q. And you were between the crossing and the bridge were you?

A. Yes, sir.

Q. And about how far away from the crossing?

A. Well, I should judge about five or six hundred feet. I never took any pains to measure it.

Q. Is there any hill or any trees or anything of that kind to break

away or obstruct or interfere with your hearing the train as it came over that bridge?

A. No, sir; there was nothing but little brush, there were no hills.

Q. There were no obstructions to your hearing in that direction?

A. No, sir.

Q. Did I ask you about whether there was any wind on that day or not?

100 A. Yes, sir; it was a westerly wind, from a western direction.

Mr. BRIDGES: That is all.

Recross-examination.

By Mr. GROSSCUP:

Q. There were no obstructions anywhere except this scrub timber from the top of the grade, going down the grade to the railroad track from the way the train was approaching that day, that is after you get out of the cut, there were no obstructions at all in the direction the train was approaching this crossing, were there?

A. No, sir; there is nothing from the bridge to the cut, after you get out of the cut in the railroad, there is a little brush on this point?

Q. Nothing that would obstruct the sound materially?

A. No, sir; I do not think so.

Mr. GROSSCUP: That is all.

Mr. BRIDGES: That is all.

Examination of Mr. Baldwin closed.

The COURT: We will suspend until 10 o'clock tomorrow morning.

Thereupon the court ordered an adjournment until ten o'clock, Saturday morning, February 20th, 1897.

101

TACOMA, WASHINGTON, 10 A. M.,

SATURDAY, February 20, '97.

All present; proceedings continued, pursuant to adjournment.

Mr. F. E. TOMPKINS recalled.

Examination-in-chief.

By Mr. LINN:

Q. I will ask you, Mr. Tompkins, if you desire to explain an answer made by you on yesterday to the question as to whether the same obstructions existed between you and the railroad train and Mr. Freeman and the railroad train at the time you heard it as you were working upon that building, upon the parsonage?

A. Well, I should think that there was quite a difference; the fact that I was up off the ground was quite a difference, as I was at a considerable height—

Mr. GROSSCUP: We object to the witness giving his conclusions in regard to these matters. He has already described the conditions and circumstances, the lay of the ground and all surroundings, and

we object because it calls for the conclusion of the witness which must be determined by the jury and not by the witness.

Q. I think the witness desires to explain his answer on yesterday. Is that correct, Mr. Tompkins?

Mr. GROSSCUP: I object because the matter has all been gone into before.

102 Mr. LINN: Mr. Tompkins said that the same obstructions existed between Mr. Freeman and the railroad train as between him and the railroad, and he desires to explain that answer.

The COURT: The trouble is, the witness is asked to explain and he is attempting to make an argument.

Mr. LINN: May I ask him if he desires to explain or correct his answer?

The COURT: If he wants to explain or correct his answer he may do so, but he is going into an argument stating that a man at a certain elevation from the ground would be in a better position to hear than a man would in a wagon running along the road. That is to be determined from the evidence, and would be proper enough in your speech to the jury, but it is not proper to be sworn to by the witness.

Q. I will ask you simply to state the conditions that existed between you and the railroad train and between Mr. Freeman and the railroad train on that day.

The COURT: I will overrule the objection to that question.

Mr. GROSSCUP: We except.

The COURT: Exception allowed.

Q. Just give the facts as they were there.

A. Well, where I was on the building of course I could hear and see the train over a great many of these obstructions, and take it a block north of there on the road on the street where Mr. Freeman was, of course there would be more obstructions to his hearing than there would be to mine.

Mr. LINN: That is all.

103 Cross-examination.

By Mr. GROSSCUP:

Q. From where you saw Mr. Freeman, however, at the point where you saw Mr. Freeman last the ground from that out to the railroad track below was approximately level, was it not?

A. No, it was downgrade.

Q. But it was even?

A. Yes, sir, it was even.

Q. So that the only obstructions to Mr. Freeman from where the train was coming was this scrub timber, was it not?

A. The timber and the cut.

Q. But the cut that the railroad train came through—

A. Yes, sir.

Q. How long was that cut from the crossing on the right-hand side?

A. It is about 300 feet.

Q. So that if the train was more than 300 feet from the crossing there would be no obstructions caused by the cut, would there?

A. I think that the natural lay of the ground there would be an obstruction, the natural lay of the land.

Q. Was there any obstruction caused by the natural lay—if the timber had been cut out would it not have been possible for Mr. Freeman to have seen the train from the brow of the hill, say a thousand feet or more down the track?

A. I think he could have seen it then.

Q. If the timber had been cut?

A. Yes, sir.

104 Q. So then the only obstructions to the hearing of the train for a thousand feet down the track was the timber.

A. Yes, sir; that would be all.

Q. And if this timber was simply scrub oak with hazel brush and undergrowth there would not be much of obstruction, would there?

A. That would be about the situation.

Q. You heard the train from where you were nearly a mile?

A. I heard it when it crossed the bridge.

Q. Well, that is nearly a mile, is it not?

A. Yes, sir.

Mr. GROSSCUP: That is all.

Mr. LINN: That is all.

Examination of Mr. Tompkins, recalled, closed.

Mr. A. H. BALDWIN recalled.

Examination-in-chief.

By Mr. BRIDGES:

Q. I believe that you testified yesterday that you were at this crossing very shortly after this accident?

A. Yes, sir.

Q. I want to ask you if you have about the time of that accident and since that time and very recently made any observations or examinations of the embankment that is formed by the cut in the wagon road leading down to the railroad track, the right-hand bank as Mr. Freeman was going down towards the crossing? Do you understand what I mean?

A. I did, sir.

105 Q. Let me ask you whether or not that bank as it stands up there today is the same practically as it was at the time of this accident?

A. No, sir.

Q. You may explain—you understand where that bank is which I refer to, do you?

A. Yes, sir, it is the point that sticks out this way and the railroad comes down from here (indicating).

Q. You did not answer that portion of the question, whether you have examined it?

A. Yes, sir; I have.

Q. State what the difference is, what it was then and what it is now.

A. Well, there is over a foot and a half of that end of the bank has caved off, and one post of the fence that goes onto the cattle-guards is hanging by the wires, where the ground has caved off and left the post hanging. It has caved in I am satisfied over a foot or a foot and a half at that point, right at the point has caved off.

Q. Are there any other changes that you know of?

A. Well, the hazel brush is all cut off at that point, and back over the point for a little ways has been cut off.

Q. I will ask you whether there were any hazel brush or bushes of any kind on this point that was formed there, if that is the one that has crumbled off.

A. Yes, sir.

Q. It had not crumbled off at that time, but has since crumbled?

A. Yes, sir.

Q. Describe how that brush and hazel bush was at the time of this accident, how it was situated on that point?

106 A. Well, it stood right up on that point. I have gathered hazel nuts there off of it there in times gone by and there ain't any there any more! there is no brush on that point at all.

Q. I will ask you whether or not that brush you speak of was standing up or whether it leaned over?

A. Well, some of it stood upright and some of it leaned over.

Q. Leaned over in what direction?

A. Leaned over towards the railroad east.

Q. Leaned over the cut?

A. Over the cut, yes, sir.

Q. Over the point?

A. Yes, sir.

Q. Did you make any observations at the time of this accident as to — far back from the railroad track one could see down to the railroad to where this hazel brush and so forth, down 200 or 250 feet down the railroad track were?

A. How far back of that?

Q. Yes; down the direction of the track from the wagon track, how far you could see beyond that?

A. Well, there were several of us stepped it off and it was about twenty-five feet.

Q. At that time?

A. Yes, sir, at that time from the track.

Q. From what portion of the track. Was it from the center or on the rail?

A. From the rail.

Q. From which rail?

A. The west rail.

Mr. BRIDGES: You may take the witness.

107 Cross-examination.

By Mr. GROSSCUP :

Q. You testified yesterday, did you not, Mr. Baldwin ?

A. Yes, sir.

Q. Have you conversed with the attorneys on this subject since yesterday ?

A. I didn't see them until this morning and then I talked with them just a little bit.

Q. You have conversed with them, then, since giving your testimony yesterday ?

A. Yes, sir ; I talked a little bit coming up in the elevator as we came up to the court-room this morning.

Q. Now, you say that that bank has caved down about a foot and a half ?

A. Yes, sir.

Q. Do you know what caused it ?

A. Well, I couldn't say.

Q. And about how much has it caved ?

A. Well, I should say it was about a foot and a half or over ; it might be a little more ; I do not know.

Q. How long has this hazel brush been hanging over there ?

A. Well, I would say it was from six to eight feet high.

Q. But how long has it been since this cave off occurred ?

A. Well, sir, I don't know ; I just noticed it about a month ago.

Q. You just noticed it about a month ago ?

A. Yes, sir.

Q. How long do you think it has been ?

A. I should think looking at the post that it had been there six months.

108 Q. Not more than six months ?

A. No, sir ; I should not think so.

Q. Not less than six months ?

A. No ; I don't think so.

Q. Then in the last six months those conditions there have not substantially changed ?

A. Yes, sir ; I am sure of that.

Q. And before six months you think they were about the same as they were at the time of the accident except the cutting of the hazel brush down at the point ?

A. Well, I would not be so positive about it being exactly six months, but along about that, I should judge.

Q. Now, Mr. Baldwin, would you say that that ground has caved off there as much as five feet ?

A. No, sir.

Q. You think that it would not amount to as much as five feet ?

A. No, sir.

Q. You made no measurements of it ?

A. No, sir.

Q. At the time of the accident did you make any measurements of that particular point ?

A. No, sir.

Q. Your estimate is mere guesswork?

A. Well, the post is bare and is hanging there by the wires; it has crumbled off just near up to the fence—the post has slipped loose from the fence and is dangling there. It shows about how far from the fence post it had crumbled.

Q. Now, how many fence posts were there—how far apart were these fence posts?

A. Well, they were eight feet apart I should judge.

Q. That one fence post is all that has been changed?

A. Yes; there is just one bare and hanging.

109 Q. But the fence posts themselves have not been changed?

A. No, sir; it is just caved off from it.

Q. They are the same distance that they were at the time of the accident?

A. Yes, sir.

Q. And that gravel pit lying between the railroad track and the bank is the same as it was at the time of the accident except this cave off?

A. Yes; and a few brush.

Q. Well, these brush are not high enough to obstruct the view in that gravel pit?

A. Yes, sir; some of them are.

Q. How high are they?

A. Running from eight to ten feet, some of them, I should think?

Q. Down in the gravel pit?

A. All along the cut.

Q. Don't you know that grove to be about 300 feet down from the railroad crossing—that would not obstruct the view, would it?

A. No, sir; 300 feet down to the brush it would not; between there it wouldn't.

Q. Well, between this point 300 feet down to this brush, between the crossing and this brush, 300 feet down to the gravel pit, that would not obstruct the view?

A. No, not along the side there.

Q. There was no brush between these two points at the time of the accident, was there?

A. No, sir.

Q. Now, you think that it is about the same thing now as it was at the time of this accident except for this cave off of a foot and a half?

A. Yes, sir; and the brush.

110 Q. And you say that the brush has lopped over there a little bit?

A. Yes, sir; it is quite a slope where this brush came up there, and from that slope down towards the railroad track, down to the bottom so that the brush has caved off there—well, it has gone clear down below there very nearly to the bottom.

Q. Some brush you think has gone down to the bottom?

A. Yes, sir.

Q. Were there any brush there high enough to obstruct the view?

A. Oh, some of them would ; yes, sir.

Q. Some of them—were they high enough to obstruct the view ?

A. Well, I think many of them were eight to ten feet ; a man couldn't see over them very well.

Q. Down in the gravel pit ?

A. Yes, sir ; down in the bottom of the pit.

Q. Down at the edge of the gravel pit ?

A. I couldn't say whether there is or not.

Q. Is it not a fact then there were no brush there to cut off the view between the railroad crossing and this point that you speak of—was there any brush to obstruct the view more than a foot high between those two points ?

A. At that one place.

Q. I mean right at the road.

A. Right at the crossing, yes, sir.

Q. The brush would obstruct down farther about 300 feet but not right at the crossing ?

A. Except at that one point.

Mr. GROSSCUP : That is all.

Examination of Mr Baldwin, recalled, closed.

111 Mr. J. S. WHITEHEAD, a witness for the plaintiff-, sworn, testified as follows :

Examination-in-chief.

By Mr. BRIDGES :

Q. State your name.

A. J. S. Whitehead.

Q. Where do you live ?

A. Elma, Washington.

Q. How long have you lived there ?

A. About four years.

Q. Were you acquainted during his lifetime with T. A. Freeman ?

A. I was not.

Q. Did you know him when you saw him ?

A. I did not.

Q. Do you remember the day upon which he was killed at the railroad crossing near Elma ?

A. I do.

Q. Where were you on that day and what were you doing ?

A. I was assisting in building the parsonage about three or four hundred feet from the accident.

Q. Is that the same parsonage that Mr. Tompkins was working on ?

A. Yes, sir.

Q. With some others ?

A. Yes, sir.

Q. I will ask you whether or not you observed the freight train coming in on that day ?

A. I did.

Q. And whether you observed whether it whistled or not at the whistling post for the crossing?

A. Well, I did not hear it; it may have done so.

Q. You did not hear it?

A. No, sir.

112 Q. I will ask you whether or not you heard the bell ring?

A. I did not.

Q. Did you hear any other signals that they may have made?

A. I did not.

Q. I will ask you whether or not with relation to the surroundings and the law of the land and the obstructions you were in a position where you could hear and observe if there were any signals?

A. My position was such that I might have observed signals if I had any intent to do so, but I was working and not paying any attention to the train.

Mr. BRIDGES: You may take the witness.

Cross-examination.

By Mr. GROSSCUP:

Q. You heard the train coming in, did you?

A. Yes, sir.

Q. You remember of hearing the train?

A. I distinctly remember of hearing it. I heard it as it crossed the little bridge about a mile south.

Q. Did you hear it from that point up to the crossing?

A. Well, I undoubtedly heard it, but I did not pay any attention to it.

Q. Your attention was not directed to the train particularly except as it was crossing the bridge?

A. No, the fact that it made a little louder noise as it came across the bridge directed my attention to it at the time, and I made one or two—

Q. Never mind what was said. You were down on the ground, were you?

A. Yes, sir.

Q. Did you hear the train from the bridge subsequently up to the crossing?

A. No, sir.

113 Q. You did not pay any attention?

A. I did not pay any attention.

Q. Do you frequently hear the trains coming up from that place?

A. Not in that locality I do not, but I hear the trains occasionally.

Q. There is no difficulty about hearing the train if you try to?

A. You usually can hear the train along in that locality, in most any part of that locality, down onto that public street on down below the post-office. You can usually hear it crossing the bridge. There is a little trestle there that makes a noise when the train passes over it.

Q. You can hear it from that point uptown if you listen for it?

A. Well, I rather doubt hearing it all the way, because it seems that in coming up when it gets to that embankment that the train does not make as much noise as it does in coming over the trestle on the bridge.

Q. You were working down on the level of the ground, I understand you?

A. Yes, sir.

Q. And you would not be able to say whether the train whistled on that day or not?

A. Well, I would not be able to say whether it did or did not; I did not hear it.

Q. But frequently the train whistles and you do not hear it?

A. Why, probably when I am on the train it whistles, but I do not hear it whistle.

Q. You do not pay any attention to it?

A. No, sir.

Mr. GROSSCUP: That is all.

114 Redirect examination.

By Mr. BRIDGES:

Q. Have you ever been along the brow of the hill or very close by when the train was going by through the cut from the south and east?

A. I was on that occasion on the hill.

Q. I believe you said that you did not remember of hearing the train after it crossed the bridge?

A. Not distinctly; no, sir, not until it got into the cut and then I noticed the rumble. The sound there is to some extent deadened as it comes from the cut, especially if there is any wind from the east. There was possibly a little wind that day from the west, so that we could hear it distinctly. I heard it as it sort of jostled over the bridge and at the trestle.

Q. Do you think you could hear it any more distinctly than you could from the road?

A. Why, no, sir.

Mr. GROSSCUP: That is all.

Mr. BRIDGES: That is all.

Examination of Mr. Whitehead closed.

Mr. HUDSON: We now offer in evidence a certified copy of the order appointing Mr. Bridges guardian *ad litem*.

Paper referred to marked for identification "Plaintiffs' Identification G."

Mr. GROSSCUP: No objection.

The COURT: It may be received.

Paper referred to received in evidence and marked "Plaintiffs' Exhibit G."

115 Mr. WILBUR KOCHER, a witness for the plaintiff, sworn, testified as follows:

Examination-in-chief.

By Mr. BRIDGES:

Q. What is your name?

A. William Kocher.

Q. Where do you live?

A. In Elma, Washington.

Q. How long have you lived there?

A. About two years and a half.

Q. Do you remember the day upon which Mr. T. A. Freeman was killed at the crossing near Elma?

A. Yes, sir.

Q. Where were you living at that time?

A. I was living at Church's mill.

Q. Where is that with relation to Elma?

A. About six miles east of that.

Q. To go to Church's mill from Elma do you go by that crossing where Mr. Freeman was killed?

A. Yes, sir.

Q. Is there any other road leading from the town of Elma eastward but this one upon which this crossing — where he was killed?

A. Not to get to the mill; no, sir.

Q. Do you know of any road leading out from the town of Elma eastward but this one road?

A. Not without crossing the railroad.

Q. Then do I understand you that this was the main-traveled road by wagon or otherwise leading from the town of Elma to the eastward?

A. Yes, sir.

Q. All travel by wagon or otherwise in such manner eastward must go along this road and over this crossing where Mr. Freeman was killed?

A. Yes, sir.

Q. Do you know whether that road is frequently or infrequently traveled?

A. It is a public road; it is traveled all the time.

Q. When you say all the time do you mean that there is very much travel there?

A. Well, there is teams there every day, passing back and forth.

Q. Are there many teams—in a general way is there much travel along that road leading to that crossing?

A. There is considerable travel; yes, sir.

Q. Did you see T. A. Freeman on that day, the day upon which he was killed?

A. Yes, sir.

Q. Where did you see him first?

A. I saw him in Elma.

Q. Uptown?

A. Yes, sir.

Q. Under what circumstances did you see him there?

A. I saw him come out of the store, untie his team, get into his wagon and drive off.

Q. What were you doing?

A. I was going through town with my team and drove up to the same store that he was at.

Q. Where did you see him next?

A. I was in sight of him and his team until he got to the crossing.

Q. Did you follow on down the street after him in your team?

A. Yes, sir.

Q. How were you driving? Were you in a wagon or a buggy?

A. I was in a wagon.

Q. What did you have in your wagon?

A. I had some flour and feed and some groceries.

117 Q. Did you have a double team?

A. Yes, sir.

Q. He was ahead of you then going towards this crossing, you were behind him.

A. Yes, sir.

Q. How far behind him were you when he got to within 100 feet of the brow of the hill leading down to this crossing?

A. I was about a block or a little over, probably.

Q. Now, describe to the jury and to the court how he was going and what he did or was about to do when you saw him last, up to the time you saw him last, what he was doing?

A. Why, he was sitting in his wagon, driving his team along, the same as any one would.

Q. Was he driving rapidly or slowly?

A. Why, he was driving on a trot all along down the street, and when he got onto the top of the hill to go down he slacked into a walk, and his team was walking the last I saw of him.

Q. Was that at the brow of the hill?

A. Yes, sir.

Q. Was his team walking then?

A. Yes, sir.

Q. Did you see him until he commenced going down the hill?

A. I saw him until he got part way down the hill.

Q. Now, what else did you observe there with reference to the accident?

A. I saw the wagon flying and seen the train, and the horses go up the hill on the other side.

Q. Did you stop your team?

118 A. Yes, sir; I stopped my team as soon as I heard the crash, turned around and tied my team up.

Q. Were you driving on a trot or a walk?

A. On a walk.

Q. What is the character of the road along there, Mr. Kocher?

A. It is a good road.

Q. Well, as to its being sandy or gravelly, or rocky?

A. Why, it is a sandy road.

Q. Would a wagon such as yours if driven along there with the team in a walk, a slow walk, make much noise?

A. No, sir.

Q. Now, I will ask you, Mr. Kocher, when you first knew that there was a train approaching?

A. The first I knew was when I first heard it hit the wagon, I heard it strike the wagon and heard the crash was the first I knew or heard of the train.

Q. Had you heard the train at all before that?

A. No, sir.

Q. Did you hear any whistle?

A. No, sir.

Q. Did you hear any ringing of the bell?

A. No, sir; I did not hear a sound at all.

Q. Did you hear the running of the train?

A. No, sir.

Q. I will ask you whether or not you were paying attention to your business?

A. Yes, sir.

Q. Were you awake?

A. I was not asleep.

Q. The first you knew of the train coming was when it crashed into the wagon.

A. Yes, sir.

Q. Is your hearing good?

A. Yes, sir.

Q. Was it at that time?

A. Yes, sir.

Q. Your eyesight was good at that time?

A. Yes, sir.

119 Q. Now I will ask you whether Mr. Freeman seemed to be driving his team and to be alert and awake when you last saw him just before he was run into by the cars?

A. Yes, sir; he was sitting there, driving along as well as any one would.

Q. Did he appear to be attending to his business?

A. Yes, sir.

Q. Well, let me ask you whether or not you were in this store with him?

A. No, sir.

Q. Were you in the store at the same time he was?

A. No, sir.

Q. Did he stop at any time between the brow of the hill and up-town?

A. Yes, sir.

Q. What did he do when he stopped?

A. He stopped at a house and went in and got a satchel.

Q. How far from the brow of the hill was this house where he stopped?

A. I should say about two blocks or two and a half.

Q. How far is the house from the street that he went into?

A. Why, it is right close to the street, just stood back a little way from the sidewalk, probably ten or twelve feet.

Q. And the house you say was a block and a half to two blocks from the brow of the hill?

A. It is about two blocks from the brow of the hill—it might have been farther—may have been three blocks.

Mr. BRIDGES: You may take the witness.

120 Cross-examination.

By Mr. GROSSCUP:

Q. How long are those blocks?

A. I don't know.

Q. About 300 feet, are they not?

A. I could not say how long they are.

Q. Have you any idea how long they are?

A. No, I have not; I never measured one of them or seen one measured.

Q. The point where he went into the house and got the satchel was about three blocks from the brow of the hill, you think?

A. Yes, sir.

Q. Then the hill is, I understand, about 100 feet down to the track from the brow of the hill?

A. Yes, sir; I should think it was.

Q. And you were about a block behind Mr. Freeman as he drove up to the brow of the hill?

A. Yes, sir.

Q. Were those blocks about as long as these are here in town?

A. About the same, I should think.

Q. After Mr. Freeman passed over the brow of the hill you did not see him any more?

A. After he got part way down the hill I did not see him.

Q. You saw no more of him?

A. No, sir.

Q. The brow of the hill obstructed your view?

A. Yes, sir.

Q. You cannot tell how far he was over the brow of the hill before he passed from your view?

A. About half way down, I should think.

Q. You didn't listen for the train that day, did you?

A. I did not stop and listen; no, sir.

Q. You did not listen—you had no occasion to do so, had you?

A. No, sir.

121 Q. You frequently have to stop and listen for trains as you go over there, do you not?

A. I do in going that way, if I am going out that way I stop and listen, if I am not going that way, why, I don't.

Q. In fact you always stop to listen for the train when you are going to cross that crossing, don't you?

A. Of course—that is I do if it is train time—but I don't stop to listen for the whistle.

Q. If you don't hear the whistle you go ahead?

A. Yes, if I don't hear the whistle I go on, unless it is right at train time, if it is, why then, I wait.

Q. If you don't hear the whistle you drive on down to the crossing?

A. Yes, sir; unless it is right at train time.

Mr. GROSSCUP: That is all.

Redirect examination.

By Mr. BRIDGES:

Q. Do you know what time that freight train was due at Elma at that time?

A. I don't know, but I think about 3 o'clock it was due.

Q. Do you remember whether or not it was behind time that day?

A. Yes, sir.

Q. Do you know how much it was behind time?

A. No, sir; I do not know how much, but very nearly an hour.

Q. Do you say that the house where Mr. Freeman went in was Mr. Byles' house?

A. Mr. Comb's house, I think it was.

Mr. BRIDGES: That is all.

122 Recross-examination.

By Mr. GROSSCUP:

Q. You say that the train was nearly an hour late and that it was due about 3 o'clock?

A. Yes, sir.

Q. So that this accident happened about 4 o'clock?

A. I think so, yes, sir.

Q. You do not know just how close to 4 o'clock it was, do you?

A. Well, pretty close, not very far either way.

Q. Not more than five minutes either way from 4 o'clock?

A. Oh, I don't know that; I don't think it would be a quarter of an hour either way. It might be a half hour, but I don't think it was that much, a quarter to a half hour, either way.

Q. You would say, though, a quarter to a half hour from 4 o'clock, either way, would be about the time?

A. Yes, it may have been from a quarter to a half hour.

Q. You think it was in the vicinity of four o'clock.

A. Yes, sir.

Mr. GROSSCUP: That is all.

Redirect examination.

By Mr. BRIDGES:

Q. Did you observe on that occasion whether or not Mr. Freeman's wagon made much noise?

A. Well, I did not notice the rattle of his wagon for what noise mine made; I did not hear his wagon at all.

Q. You did not hear any noise that his wagon made at all?

A. No, sir.

Mr. BRIDGES: That is all.

Examination of Mr. Kocher closed.

123 Mr. R. W. WATSON, a witness for the plaintiff, sworn, testified as follows:

Examination-in-chief.

By Mr. BRIDGES:

Q. State your full name.

A. R. W. Watson.

Q. Where do you live?

A. At Elma, Washington.

Q. How long have you lived there?

A. About eight years.

Q. Do you remember the day upon which Mr. Freeman was killed at the railroad crossing just east of town?

A. Yes, sir, I remember the occurrence; I do not remember the date nor the day.

Q. You were not present at the time?

A. No, sir.

Q. I will ask you whether you have ever been much upon the brow of that hill there?

A. I lived on the top of that hill for a year, just above the railroad cut.

Q. How far back from the railroad track?

A. I think probably three or four hundred feet.

Q. I will ask you whether you ever observed or not whether you could hear from where you were living a train when it whistled or rung the bell coming up to that crossing?

A. Well, we hear it generally when it whistles and we can hear the bell when it rings.

Q. How about the running of the train, can you hear that?

124 A. Well, it would depend a good deal upon the conditions, sometimes when the wind is in the west it would be pretty difficult to hear it. A man would have to pay very close attention to hear it when the wind was in that direction, and at other times you can hear it very distinctly.

Q. How large is the town of Elma, or was it at that time?

A. How large?

Q. Yes; the population, I mean.

A. Well, I presume the population is between four and five hundred.

Q. Is there any other wagon road leading out east from Elma, any public wagon road?

A. No, sir.

Q. I will ask you whether or not there is much travel upon this road that leads out east of Elma, and was there at that time?

A. Well, it is traveled by all those who live to the east of the town, and is really the road where most of the travel comes from into town, there is the most travel upon that road. There are several mills up east of town, shingle mills and saw-mills, and it is quite a farming country, and they most all travel that road coming into town and out.

Q. Do you know where these many people you speak of, these farmers and mill people do their trading and did generally at that time?

A. Well, they do it at Elma as far as I know; there is no other place to trade.

Q. Were you acquainted with T. A. Freeman?

A. Yes, sir.

Q. How long had you known him?

A. I had known him four or five years.

Q. And up until the time of his death?

A. Yes, sir.

125 Q. What kind of a man was he physically, Mr. Watson?

A. Well, sir, he was physically almost a perfect man. I should judge that he was nearly six feet if not quite that high, and a well-made, strong man.

Q. State whether or not he appeared to be in good health?

A. I never knew him to have any illness.

Q. Let me ask you whether or not he was a sober man?

A. Yes, sir.

Q. Describe to the jury in your own way the general make-up of the man, other than physically, I mean mentally.

A. Well, he was a very capable man, a good business man, shrewd, and sharp, fairly well educated. He was a man that was capable of making a first-class living for himself and his family. I know that his earnings there for a time were quite large. I have heard him speak of them.

Mr. GROSSCUP: We object to anything that he may have said to the witness, and move to strike out that portion of his answer.

The COURT: Strike it out as immaterial and hearsay.

(Motion sustained.)

Q. I will ask you whether or not he was active and industrious?

A. How is that?

Q. Whether he was an active and industrious man?

A. Well, I think so, I never knew him to be idle, never knew him to be without something on hands to do.

Q. Now, with relation to his temperament, as to whether or not he was excitable. State what was his disposition in that regard, so far as you know.

126 A. Well, his disposition was that of a fairly well balanced man. I never saw him excited; I should say he was a fairly cautious man.

Q. Do you know how old he was, or about what his age was?

A. I should judge him to be a man somewheres around 32 or 33, or 34 years old, somewheres from 30 to 35 years old.

Mr. BRIDGES: You may take the witness.

Mr. GROSSCUP: No cross-examination.

Examination of Mr. Watson closed.

Mrs. H. F. WOOD, a witness for the plaintiff, sworn, testified as follows:

Examination-in-chief.

By Mr. BRIDGES:

Q. State your full name, Mrs. Wood.

A. Mrs. H. F. Wood.

Q. Where do you live?

A. In Seattle.

Q. Were you acquainted during his lifetime with Thomas A. Freeman?

A. Yes, sir.

Q. What relation, if any, did you sustain to him?

A. He was my brother.

Q. He was your brother?

A. Yes, sir.

Q. Where were you living at the time he was killed at this railroad crossing, Mrs. Wood?

A. In Russiaville, Illinois.

Q. You know nothing personally about this accident?

A. No, sir.

Q. Which was the older, you or your brother?

A. I was the oldest.

127 Q. I will ask you whether or not you have known him and have been with him since his infancy?

A. Ever since I can remember.

Q. Describe to the jury what kind of a man he was as to his temperament and physically, his habits and his ability to make a living.

A. Well, he had no bad habits whatever, I never saw him intoxicated in his life. He never chewed or anything of that kind, and he always made his living ever since he was 12 years old. He never had but one spell of sickness that ever I knew of and that was when he was about 19 years old, and he was capable of making a good living.

Q. What was his age, Mrs. Wood?

A. He would have been 33 years old the 19th of March if he had lived.

Q. Do you know what has been his occupation from the time he started out to work for himself, up to the time of his death, his several occupations, if there were several?

A. Well, from the time he was 12 years old of course he had to work on the farm, and went to school in the winter, and then he was married to his first wife, and he run on the road. He was bag-

gageman on the railroad, and then since that he was traveling for school supplies.

Q. Do you know what was his wages any part of that time, or any portion of that time?

A. He has made——

Mr. GROSSCUP: We shall object to that as being too remote, taking his wages over a period of twelve years, we think too remote.

The COURT: Objection overruled. If she knows she may state.

128 Mr. GROSSCUP: Defendant- excepts.

The COURT: Exception allowed.

Q. Answer the question.

A. Well, while he was running on the road he made eighty-five dollars a month.

Q. As baggageman?

A. Yes, sir; of course I do not know just exactly how it was, or that I could explain it, how it was, but he made some extra, but I know that was what he made in a month, for I was right there.

Q. Do you know any other moneys or salary he received during his lifetime?

Mr. GROSSCUP: We make the same objection as to the other question, that it is too remote and indefinite.

The COURT: Objection overruled.

Mr. GROSSCUP: We ask an exception.

The COURT: Exception allowed.

A. Well, I know that when he was a young man from 17 to 19 he got \$19 a month, that was the common ordinary wages there in Illinois.

Q. Do you know what he made when he was working for this school-house, school-furniture house, or whatever it was?

A. Well, I could not say—I never heard him say.

Mr. GROSSCUP: We object to the witness making any other answer, she says she don't know.

Mr. BRIDGES: Take the witness.

Examination-in-chief.

By Mr. HUDSON:

Q. What was his first wife's name?

A. Nettie Hotchkiss.

129 Q. What was his full name?

A. Thomas Andrew Freeman.

Q. You knew them when they were living together as husband and wife, did you?

A. His first wife?

Q. Yes.

A. Yes, sir.

Q. Do you know of any children by that marriage?

A. He has one daughter, Lennie.

Mr. HUDSON: That is all.

Cross-examination.

By Mr. GROSSCUP :

Q. When did he work on the railroad ?

A. Well, I will have to think a little.

Q. In what years ?

A. Well, it has been about 12 years ago, I think.

Q. 12 years ago ?

A. Yes, 11 or 12 years ago, that is as near as I can tell you now.

Q. And how long did he work on the railroad ?

A. About three years, I think.

Q. That was back in Illinois ?

A. Yes, sir, that was in Illinois, that was where he lived.

Q. Was that when he was married to his first wife ?

A. Yes, sir.

Q. About how long did he work for this school-supply house ?

A. I think he has traveled about six years for the school supply.

Q. When did he quit ?

130 A. That I could not say.

Q. Well, about how long ago—how long before his death ?

A. Well, I could not say, for I was not here in Washington. I was in Illinois. Therefore I could not say.

Q. You could not state how long ?

A. No, sir, I could not state how long it has been.

Mr. GROSSCUP: That is all.

Mr. BRIDGES: That is all.

Examination of Mrs. Woods closed.

Mr. G. W. BRADLEY, a witness for the plaintiff, sworn, testified as follows:

Examination-in-chief.

By Mr. HUDSON :

Q. What business are you engaged in ?

A. I am a life-insurance agent.

Q. Here in Tacoma ?

A. Yes, sir.

Q. What companies do you represent—is it a fact that you represent one of the largest life-insurance companies in this part of the country ?

A. I represent the Mutual Life Insurance Company of New York.

Q. Are you accustomed in connection with the issuance of life-insurance policies to examine the mortality tables issued for the use of life-insurance companies ?

A. I am.

Q. How long have you been engaged in the life-insurance business ?

A. A little over two years.

Q. Do you know and will you state if you know what tables are

in general use among the prominent life-insurance companies in this country?

131 A. There are two mortality tables that are used, generally, some use one and some use the other. There are the actuary and the American tables—they vary but a very little, however.

Q. Have you those tables with you?

A. I have.

Q. I wish you would refer to the age of thirty-three years, and point out what would be the life expectancy of a man in good health at that age?

A. By the American table the expectancy of life of a man at the age of thirty-three years would be thirty-three and twenty-one one-hundredths years.

Q. And by the other tables?

A. By the actuary table the mortality expectancy would be, of a man thirty-three years old would be thirty-two and thirty-one one-hundredths years.

Q. Now at the age of thirty-four what would be the difference? There is some difference in the testimony, so give it to cover thirty-four years.

A. At thirty-four years the expectancy by the American table would be thirty-two and fifty one-hundredths years; by the actuary it would be thirty-one and fifty-eight one-hundredths years.

Q. Now give it for thirty-two years.

A. At thirty-two years by the American tables it would be thirty-three and ninety-five one-hundredths years; by the actuary table at thirty-two years it would be thirty-three and one one-hundredth years.

Mr. HUDSON: You may take the witness.

Mr. GROSSCUP: No cross-examination.

Examination of Mr. Bradley closed.

132 Mrs. SERRETTE O. FREEMAN, a witness for plaintiff, recalled in chief, testified as follows:

Examination-in-chief.

By Mr. BRIDGES:

Q. Mrs. Freeman, to whom does this ranch belong in Chehalis county upon which you were living at the time of your husband's death?

A. To his mother, that is, it is in his mother's name.

Q. Explain the manner in which it is in his mother's name—who paid for it and so forth?

Mr. GROSSCUP: That is objected to as incompetent, irrelevant, and immaterial.

The COURT: Objection sustained.

Q. Mrs. Freeman, I will ask you whether or not you know of Mr. Freeman having saved up any moneys or money at the time of his death, or prior to his death?

Mr. GROSSCUP: We object to that as incompetent, irrelevant, and immaterial, and not necessarily connected with the man's earnings.

The COURT: Objection sustained.

Mr. BRIDGES: Plaintiff- excepts.

The COURT: Exception allowed.

Q. How far was the ranch from the town of Elma?

A. One road that we went it was fourteen or fifteen miles, and another road we went it was only twelve miles. We had two roads leading to the ranch.

Q. Was Elma the point at which you did your trading?

A. Yes, sir.

Q. Where you bought your provisions, and so forth?

A. Yes, sir.

133 Q. Do you know what kind of a wagon your husband was driving in on this day?

A. Well, it was a new wagon—it was a wagon that had not been in use very long. It was a good solid wagon and sound.

Q. Do you know whether there were any springs under the wagon or not?

A. Well, I could not say; I suppose it was like all other ordinary wagons for farm use.

Q. Do you know what kind of a bed, if any, it had on at this day?

A. Well, it had on a good bed, a strong bed, because the wagon was new.

Q. Do you know where he got the wagon?

A. If I am not mistaken he got it in Portland, Oregon.

Q. Now, Mrs. Freeman, you may describe to the jury in your own way the character of Mr. Freeman, as to his general disposition, his ability to earn a living and things of that kind, and also his temperament. Describe it to the jury in your own way all about him, if you can?

A. I never saw Mr. Freeman out of humor while I lived with him, and he was a good, strong, sound man, capable of making a good living, had no bad habits, and he was a good husband.

Q. Do you know whether or not he was naturally excitable or not?

A. No, sir, he was not excitable at all.

Mr. BRIDGES: You may take the witness.

Mr. GROSSCUP: No cross-examination.

134 Examination of Mrs. Freeman, recalled, closed.

Mr. BRIDGES: If your honor please, that is the plaintiffs' case. We rest.

Plaintiff- rests.

Thereupon the defendant- introduced the following testimony:

Mr. C. E. SPRINGER, a witness for the defendant-, sworn, testified as follows :

Examination-in-chief.

By Mr. GROSSCUP :

Q. Please state your name in full.

A. C. E. Springer.

Q. You are in the employ of the Northern Pacific Railway Company, are you?

A. Yes, sir.

Q. You were in the employ of the receivers of the Northern Pacific Railroad Company, were you?

A. Yes, sir.

Q. You have been in the employ of the company for the past three or four years, have you?

A. Well, I was in the employ of the company and from time of the receivership I was in the employ of the receivers.

Q. In what department of the service are you employed?

A. In the engineering department.

Q. Are you a practical engineer yourself?

135 A. I have had some ten years' experience in that line.

Q. Are you also a practical draughtsman?

A. Yes, sir.

Q. Also a photographer?

A. Yes, sir.

Q. Did you go to the village of Elma at the crossing in question in this case and make any measurements and take any photographs at any time since the death of Mr. Freeman?

A. I did.

Q. When did you go there?

A. January 7th, 1896.

Q. January, '96?

A. Yes, sir.

Q. Just a little over a year ago now?

A. Yes, sir.

Q. Who accompanied you on that trip?

A. G. W. Blanchard, at that time claim agent of the Northern Pacific Railroad Company and at that time in the employ of the receivers.

Q. At that time did you make measurements of that crossing?

A. I made a survey of the crossing in company with Mr. Blanchard.

Q. And of the road at that point?

A. Yes, sir.

Q. Did you reduce that survey to the form of a plat, indicating on that plat the measurements, distances, and so forth?

A. I did.

(Paper marked for identification "Defendants' Identification 3.")

Q. I now show you "Defendants' Identification No. 3," and will

ask you if that is the paper, or is the plat, which you prepared from the measurements made upon the ground?

136 A. This is the plat, marked "Defendants' Identification No. 3," is the map prepared by me from notes that I took on the ground January 7th, 1896, and shows the condition of the railroad track, and of the county road, the gravel pit, the fence and other natural objects at that time, January 7th, 1896.

Q. Do you know when the railroad was built through the town of Elma?

A. As near as I now recollect somewhere in the neighborhood of 1890 or '91, I do not know the exact date.

Q. At the time of the building of this road what was done with reference to making a gravel pit or otherwise at the vicinity of this public road crossing?

A. The cut was widened at this point from the point some three or four hundred feet southeasterly from the crossing to a point somewhere upon the county road, just how far I can't say. The width of that cut varies from seventy to eighty feet.

Q. The width of the entire cut?

A. Yes, sir, it would average that.

Q. What was the width of this cut at this railroad crossing between the public road and a point 300 feet down on the side towards Elma?

A. It varies from 40 to 30 feet.

Q. How much?

A. 40 to 30 feet.

Q. What is its width at the road crossing?

A. It is 40 feet on the westerly side from the center of the track to the top of the bank.

Q. And how much at the bottom of the bank?

A. The slope at that point is nearly as I recall it about
137 one to one slope, that would bring it somewhere in the neighborhood of 32 feet at the bottom of the bank.

Q. What is the height of the bank?

A. 8 feet.

Q. 8 feet?

A. Yes, and this loose earth a foot above the top, and a few inches maybe a little more, but it is approximately 8 feet.

Q. The slope is a regular slope, is it?

A. Substantially a level slope, about a one to one slope to guess at it, may be a trifle more or less.

Q. Did it show any indications at the time you were there and made this survey of having changed its conditions with reference to caving down recently?

A. Well, any bank that stands for any length of time will cave more or less, but I could not see that there had been any cave there very much recently, it didn't appear to have done so.

Q. At the time that you made these notes? Q. Did it appear to be about in the same condition that it had been for a year or more before?

A. Practically so.

Q. It was in practically the same condition.

A. Yes.

Q. You say it varied from 30 feet to 40 feet from the center of the track, or was it the center of the rails, or the rail?

A. From the center of the track—

Q. It averaged 40 feet I believe you said?

138 A. Yes, sir, from the center of the track to the top of the bank to the southerly side of the county road.

Q. And it came somewhat nearer to the track as it went down the track towards the west?

A. At a point 150 feet westerly and southwesterly, measuring along the center line of the track and the center of the county road it was 41 feet from the center of the bank to the top of the bank.

Q. Was it any nearer than 41 feet between the public road and this point 150 feet?

A. No, sir, it was practically a straight line between these two points.

Q. Between 150 feet beyond and the public road it was practically a straight line?

A. Yes, sir.

Q. And at 200 feet?

A. The top of the bank was 30 feet at a point 200 feet.

Q. What was it at 300 feet?

A. The top of the bank sloped down to almost level with the track, somewhere, perhaps to two or three or four feet about. I can't state the exact distance, but the bank dies out at that point.

Q. Now, what was the condition of the bed between the railroad track and this bank at the time that you were down there?

A. The bottom was a gravelly bottom of the cut, and was carried up on each side with dirt and gravel. It was grown up on each side.

Q. What kind of gravel?

139 A. Ordinary gravel, it is very much similar to this down on the lower side of Pacific avenue and along town here.

Q. Is it clean, hard gravel?

A. Fairly clean, hard gravel.

Q. That country down there is what is known as a prairie country, is it not?

A. Yes, sir, right at that point it is prairie.

Q. Would there be any soil in the bottom of that gravel pit there or anywhere between the foot of the bank and the railroad track which would sustain any vegetation or brush timber?

A. There is more or less soil in that gravel as there is in all of the gravel in this country which will sustain a slight growth of vegetation.

Q. Was there any brush growing there when you were there?

A. Not in the bottom of the gravel bed.

Q. How far was it from the public road crossing until you came to where there had been any brush?

A. At a point 300 feet down the track from the center of the road crossing—I say "down the track," I mean southwesterly, the bank

practically died out there, and the line of brush came down to the track. That is the line where there had been brush and the brush had been cut out there at the time I was there.

Q. What is the distance?

A. Some 300 feet.

Q. From 300 feet up the road to this distance you have described from 40 feet and veering off to 30 feet had there ever been any brush since the building of the railroad?

140 A. No, sir, I made a careful examination of the surface of the ground at that time, and the ground showed no indications of having had any brush in the bottom of the gravel pit at all.

Q. How far is it from the railroad track to the top of the decline coming down on the public highway, coming down to the track? In other words between the level of the ground of the public highway and the railroad track?

A. I made a survey at the time, but I did not look at the notes since then, so I cannot say definitely. I think as near as I can recollect it was somewhere in the vicinity of 200 feet from the center of the railroad track to a point where the public road comes on to the practically level prairie. There is a slight cut there, perhaps a foot or some such matter, from six inches to a foot, averaging that anyway.

Q. How wide is the roadway adapted to travel?

A. For the greater part of the roadway on the westerly side a wagon can run the entire width of the county road, some 60 feet and the fences I think are some little more than that, some 3 or 4 feet more I think.

Q. Graded the whole width?

A. Yes, sir, graded the whole width and a traveled road up to as far as 20 to 25 feet.

Q. How far is it capable of being traveled without difficulty?

A. The entire width.

Q. Are the measurements found upon this paper, Defendants' Identification 3 correct according to your survey?

141 A. Yes, sir, those measurements are from the measurements which I took at the time there upon the ground and are correct and were at the time they were made.

Mr. GROSSCUP: I desire to offer in evidence this paper marked Defendants' Identification No. 3," together with the measurements that are upon it.

Q. On that occasion in January, 1896, did you—well, I want to ask you whether you measured the distance apart the fence posts are, on the fence running out to the cattle-guard?

A. I did not, but I think they are about 8 feet, that is the customary distance for setting fence posts in that country down there generally.

Q. Do you know the distance apart that the telegraph poles are set?

A. I cannot say definitely what those telegraph poles are.

Q. Did you make any photographs on the occasion of your visit?

A. I did.

Q. I will ask you to look at "Defendants' Identification No. 1," and "Identification No. 2," and state if those are the photographs that you made upon that occasion of your visit there in January, 1896?

A. This photograph, "Defendants' Identification No. 2," is—

Q. I asked you if those are the photographs that you made on that occasion?

A. Those are the photographs that I made, yes, sir.

Mr. GROSSCUP: If the court please, we will now offer these photographs in evidence. They have been marked "Defendants' Identification No. 1" and "Defendants' Identification No. 2."

I shall perhaps have to inquire of the witness to make some explanation of the words and figures below on the margin, and perhaps had better do that now.

Q. Are these figures on the bottom of the photograph, were they put on there by you?

A. They were all put on by me, yes, sir.

Q. Were they put on there from notes of your survey?

A. They were all put on from the notes of my survey and from measurements made on the ground.

Q. Are they correct—are those figures correct?

A. They are correct.

Mr. HUDSON: I object to the introduction of these photographs No. 1 and No. 2 on the ground they do not show or purport to show the conditions of the ground there at the time of the accident. They are photographs of the conditions at the present time, and all the testimony goes to show that the conditions are not the same there now that they were at the time of the accident.

The COURT: I will admit them subject to being connected by the testimony as to the comparative conditions now and at the time of the accident.

Mr. HUDSON: We except.

The COURT: Exception allowed.

(Papers referred to received in evidence and marked "Defendants' Exhibit No. 1" and "Defendants' Exhibit No. 2.")

Mr. GROSSCUP: I also desire that this plat be admitted in evidence, which has been identified by the witness and marked "Defendants' Identification No. 3."

Mr. HUDSON: No objections.

143 (Papers referred to received in evidence and marked "Defendants' Exhibit No. 3.")

Q. Who was present at the time that these photographs were made?

A. G. W. Blanchard and myself.

Q. Do you know where Mr. Blanchard is now?

A. I do not know just where he is, the last I heard of him he was somewhere in California.

Q. He has left the employ of the company?

A. Yes, sir.

Q. How high from the ground was the camera at the time these photographs were made, I mean how high was the object glass?

A. I can't say exactly; somewhere about 3 or 4 feet, I should judge that it was four and $\frac{1}{2}$ feet, I could tell by measuring the camera, and it was sufficiently high for me to use. I do not definitely know just how high it would have to be for me to take the sights through it.

Q. Is that your judgment that it was 4 and $\frac{1}{2}$ feet high?

A. Yes, sir, I should say it was about 4 and $\frac{1}{2}$ feet.

Q. How far back from the center of the track was your camera when you took the photograph marked "Defendants' Exhibit No. 2," that is the one that shows the train?

A. The camera was 40 feet from the center of the track at the time "Exhibit No. 2" was taken.

Q. On what place in the road did the camera stand?

A. In the center of the road.

Q. In the center of what road?

A. In the center of the wagon road.

144 Q. On the center of what was the portion of the road where these teams traveled, the main traveled portion of the road?

A. Yes, sir, the center of the track in the wagon road—that is, in the center of the county road which was fixed by the beaten track, right in the middle of the road.

Q. How far down the track, the railroad track towards the west was the back end, the rear end of the train shown in that photograph, "Exhibit No. 2"?

A. The front end of the caboose was 300 feet down the track, and the behind end would be 34 feet less than that.

Q. The back end then would be 266 feet down the track from where your camera stood?

A. Yes, sir, 266 feet.

Q. Do you know the length of the cars shown ahead of the caboose?

A. The ordinary length of a freight car in that figure would be 33 feet, they vary somewhat, but that is the ordinary length, and they would average that in that photograph.

Q. Now, in "Exhibit No. 1," where was the camera standing?

A. In "Exhibit No. 1" the camera was in the center of the track.

Q. The center of what track, the railroad track?

A. Yes, sir; in the center of the railroad track and at a point 300 feet southwest, measuring along from the center of the track to the center of the county road looking up the track towards Elma.

Q. There is a man appears in the photograph standing in the county road, was he standing towards Elma?

145 A. Yes, sir.

Q. Who was that man?

A. G. W. Blanchard was that man.

Q. Did you measure the distance he was standing from the center of the railroad track?

A. I did.

Q. What was that distance?

A. 40 feet. I drove stakes at a point 300 feet down the track and 40 feet out and at one or two other points for the purpose of making these photographs, and Mr. Blanchard was standing at the stake driven 40 feet from the center of the railroad track in the county road.

Q. One of these pictures then exactly corresponds with the other so far as distance is concerned.

A. Yes, sir.

Q. In other words, one of these pictures shows the object from the road 300 feet down the railroad track, and the other shows the object in the center of the wagon road 40 feet from the center of the railroad track and 300 feet down the track?

A. Yes, sir.

Q. That is the object of these photographs, is it?

A. Yes, sir.

Mr. GROSSCUP: If your honor please, here is a larger map that is the exact copy of the little map which has been made very recently from the smaller map. We do not care to introduce it and encumber the record, but if counsel desire and will consent to it this larger one can be used for the purpose of illustration to the jury; it shows the same figures and is in fact the same map on a larger scale.

The COURT: Counsel can use the larger map if they desire.

146 Mr. GROSSCUP: You may take the witness.

Cross-examination.

By Mr. HUDSON:

Q. How wide was the gravel bed?

A. At what point?

Q. At the road?

A. It was 40 feet on the side towards Elma from the center of the track.

Q. That is the center—that is 40 feet from the center line of the track?

A. Yes, from the center line of the track to the top of the slope on the side towards Elma.

Q. That was covered—what I mean is from the center of the road how far did the gravel extend back—how wide was the gravel pit there, what is the surface covered by the gravel in the wagon road?

A. Well, the wagon road is cut out and on down over the bank on both sides to the level of the railroad track and extends back up on the other side.

Q. That is a gravelly bank?

A. Yes, sir, gravel and sand; there is more sand up towards the surface.

Q. Then this road-bed there is a mixture of sand and gravel, the wagon-road bed?

A. Yes, sir, and mud pretty generally there at times.

Q. How wide is the railroad track?

A. Do you mean between the rails?

Q. Yes, sir.

- A. It is four feet and eight and $\frac{1}{2}$ inches between the rails.
147 Q. What is the width of an ordinary car?

A. Well, they vary somewhat.

Q. What is the average?

A. From 10, 10 to 11 feet, some of them wide, some narrower than that, but I should think that 11 feet was the average width.

Q. Do you know what was the grade there coming down from the county road from the brow of the hill down to the railroad track, what was the grade?

A. The first 20 feet, measuring from the center line of the railroad track towards Elma west is practically level, and from that point to a point some 200 feet farther back it ran practically level to the top of the bank, with a rise of 8 feet in 160 to 180, or something like that.

Q. That would make a rise of 8 feet in the hillside, as I understand you?

A. Yes, sir; practically that.

Mr. HUDSON: That is all.

Mr. GROSSCUP: That is all.

Examination of Mr. Springer closed.

The COURT: We will take a recess until 1.30 this afternoon.

Thereupon, an adjournment was ordered until 1.30 o'clock Saturday afternoon, February 20th, 1897.

TACOMA, WASHINGTON, 1.30 P. M.,

SATURDAY, February 20th, 1897.

All present; proceedings continued, pursuant to adjournment.

Mr. C. E. SPRINGER, recalled in chief, testified as follows:

148 Examination-in-chief.

By Mr. GROSSCUP:

Q. You may state, Mr. Springer, if during the noon hour you have measured this court-room.

A. I have.

Q. You may state what its length and breadth are.

A. It is 40 feet across and is 50 feet long.

Mr. GROSSCUP: That is all.

Mr. HUDSON: No questions.

Examination of Mr. Springer recalled closed.

Miss MABEL WAKEFIELD, a witness for the defendant-, sworn, testified as follows:

Examination-in chief.

By Mr. GROSSCUP:

Q. What is your name?

A. Mabel Wakefield.

Q. How old are you, Mabel?

A. Ten years old.

Q. Who is your father and mother?

A. Mr. and Mrs. Wakefield.

Q. You live in the town of Elma, do you?

A. Yes, sir.

Q. Do you remember the time that Mr. Freeman was killed at Elma?

A. Yes, sir.

Q. Did you see Mr. Freeman that day?

A. Yes, sir.

Q. Where were you when you first saw Mr. Freeman that day?

A. When I first saw him I was out in the road.

Q. Can you speak just a little louder, Mabel, so all these gentlemen over here can hear you?

A. I was out in the road.

149 Q. Do you remember where the road goes out into the cut where it starts downgrade to the railroad track?

A. Yes, sir.

Q. How far from where the road goes into the cut and the hill starts down to the railroad track were you?

A. I guess from here to about over there where you are (indicating).

Q. Then you were very near the cut on the road where the hill starts down?

A. Yes, sir.

Q. Which side of the road were you on?

A. On this right side.

Q. That would be on the side towards Elma.

A. Yes, sir.

Q. Who were with you?

A. Francis Seybold and Winnie Seybold.

Q. Were they younger than yourself or older?

A. Younger.

Q. Do you know how much younger?

A. Francis is nine and Winnie is five years old.

Q. Did Mr. Freeman pass you?

A. Yes, sir.

Q. What kind of a conveyance was he in—what kind of a vehicle—how was he driving?

A. Why, he was driving in a slow trot.

Q. When he was passing by you?

A. Yes, sir.

Q. Was he in a wagon?

A. Yes, sir.

Q. A two-horse wagon?

A. Yes, sir.

Q. How was he sitting in the wagon—do you remember his position?

A. Well, he was just sitting along the side, with his side this way (indicating), with his head down.

150 Q. Which way was he looking?

A. Looking at his horses and the team—where he was driving.

Q. Did he say anything to you as he passed you?

A. Yes, sir.

Q. What did he say to you?

A. "Hello, boys!"

Q. Then he just drove on, did he?

A. Yes, sir.

Q. Did you watch him as he drove on?

A. Yes, sir.

Q. Did you see him drive on all the way down the hill?

A. Yes, sir.

Q. How was his team going as he drove down the hill?

A. Well, they went down a ways, and then they run and flew back.

Q. How fast did they go going down the hill?

A. Just about the same all the time.

Q. In just about the same trot?

A. Yes, sir.

Q. Did the team trot the whole way down the hill?

A. No, sir.

Q. How far did they go before they got to the railroad crossing—how far did they go in that trot before they came to the railroad crossing?

A. Well, I don't know about how far.

Q. About how far do you think? You can show us by measuring it off towards the wall on the other side of this room, or towards this railing down here.

A. Well, if that was the railroad track right down there I guess it would be right down there where he stopped (indicating to railing).

151 Q. The horses were right close to the track, were they?

A. Yes, sir.

Q. Did you see the train?

A. No, sir.

Q. You just saw him?

A. Yes, sir.

Q. What did the horses do when you saw them kind of slow up?

A. They pulled up.

Q. They pulled back?

A. Yes, sir.

Q. Then what did you see them do?

A. Just when he went down the train was right close to him and he saw the train I guess and he just tried to get out of the way.

Q. Do you think the distance is as far where you are sitting as to the end of this room down the hill to the track?

A. No, sir.

Q. You think it was not that far?

A. No, sir.

Q. The horses went up to the track, did they, from the way the train was coming?

A. Yes, sir, they tried to get out of the way.

Q. Out of the way of the train?

A. Yes, sir.

Q. Now, did you notice which way Mr. Freeman was looking until he got up to that point?

A. No, sir.

Q. Did you see him look around at all?

A. No, sir.

Q. Did you notice which way he had his head turned?

A. No, sir.

Q. Do you know whether he was looking either way?

A. No, sir; I didn't notice him until just then when he saw the train——

Q. You did not notice him look either way?

A. No, sir.

152 Q. Did you see the engine strike the wagon?

A. Yes, sir.

Q. Did he stop any time until he got up so close to the train as you have described?

A. No, sir.

Q. Went right on in that trot?

A. Yes, sir.

Mr. GROSSCUP: Take the witness.

Cross-examination.

By Mr. BRIDGES:

Q. Mabel, how long ago was it that this accident happened, do you know?

A. No, sir.

Q. You don't know?

A. No, sir.

Q. Do you remember how old you were when it happened?

A. I think I was eight years old.

Q. What kind of a day was it, do you remember?

A. Well, the sun was shining bright and it was real hot that day.

Q. Do you know whether there was any wind blowing?

A. No, sir.

Q. You do not know whether the wind was blowing from the east or from the west or whether there was any at all that day?

A. There was not any.

Q. There was not any wind at all?

A. No, sir.

Q. How far away from the road were you when Mr. Freeman passed you?

A. Well, about from here to there, I guess, over there to that post I guess it would be.

Q. You were right close to the road, were you?

153

A. Yes, sir.

(It is agreed that the distance indicated by the witness is six feet.)

Q. He looked up to you and said, "Hello, boys!" to you and then he passed on, did he?

A. Yes, sir.

Q. Did he look up when he passed you?

A. Yes, sir.

Q. Did you speak to him first or he to you first?

A. No, sir.

Q. Did he speak to you first?

A. Yes, sir.

Q. Did you answer him when he spoke to you?

A. No, sir.

Q. Did he say anything else to you?

A. No, sir.

Q. Did you say you spoke to him at all?

A. No, sir.

Q. What were you doing there, Mabel?

A. We were just coming from flower-picking and were going to get my little brother that was across the track.

Q. What did you do after he passed you?

A. We just stood there and watched him.

Q. Why did you stand there and watch him, do you know?

A. I don't know—we just stood there and watched him—

Q. Did all three of you stand there and watch him?

A. Yes, sir.

Q. You watched him clear down to the track?

A. Yes, sir.

154 Q. Do you know why you did that, Mabel?

A. I don't know.

Q. Did you hear the train, Mabel, coming?

A. No, sir.

Q. You did not know that the train was coming at all?

A. No, sir.

Q. Did you hear the whistle?

A. No, sir.

Q. Did you hear the bell ring?

A. No, sir.

Q. Did you hear the train running along the track?

A. No, sir, not until it got right up where we could see it.

Q. Right at the crossing?

A. Yes, sir.

Q. You did not know that the train was coming then until it got right at the crossing?

A. No, sir.

Q. Now, you say, Mabel, that he was driving in a trot when he passed you?

A. Yes, sir.

Q. In a slow trot I believe you said?

A. Yes, sir.

Q. The horses were just jogging along down the hill, were they?

A. Yes, sir.

Q. Just like old farm horses will?

A. Yes, sir.

Q. Did you see him coming up the road?

A. Yes, sir.

Q. Well, was his team trotting that way when he came up the road?

A. No, sir, they were running.

Q. They were in a little faster trot, were they, is what you mean by that?

A. Yes, sir.

Q. They were not running off, were they, they were in just
155 a good little trot as they came up past Mr. Byles' house which is a little farther down towards the town?

A. Yes, sir.

Q. Did you see him go into any house there just before that?

A. No; I didn't notice.

Q. You do not know whether he went into one or not?

A. No, sir.

Q. Well, now, as he got nearer to you he was not driving quite so fast as he was when he was coming up the road?

A. No, sir.

Q. When he got to the hill he slowed up, didn't he, kind of?

A. Yes, sir.

Q. Almost into a walk as he started down the hill, did he not?

A. Yes, sir.

Q. And the horses kind of jogged along as horses will going down a hill, trying to hold back the wagon and keep it from pushing against them, that is the way they went down, is it not?

A. Yes, sir.

Q. Now, when you said that you thought he—I think you said that when he saw the train he attempted to pull the horses out. Now, just describe that, Mabel?

A. He was coming down in a slow trot, and when he saw the train then he tried to pull his horses around just like that. (Indicating.)

Q. And then the horses went right across the track?

A. Yes, sir.

Q. Did you see him do anything then, make any motion?

A. Well, then the train struck the wagon he went like he was going to take a jump.

156 Q. So that just about the time the train struck the wagon, just before it struck, he raised up just like he was going to jump out?

A. Yes, sir.

Q. Just before the train struck?

A. Yes, sir.

Q. He was trying to get out of the way of the train, didn't it appear to you?

A. Yes, sir.

Q. Didn't it appear when the horses pulled out as if he was trying to turn them around and stop them there?

A. I didn't see that.

Q. You could not tell?

A. No, sir.

Q. Well, now, did you stand all this time and were you in the same position as when he passed you or did you walk on down the road?

A. We were standing in the same position.

Q. You stood right there?

A. Yes, sir.

Q. Did you know who he was when he spoke to you?

A. No, sir.

Q. You did not know him at all?

A. No, sir.

Q. You think you were about how many feet, Mabel, how far back, judging from the length of this room, back from where the hill starts down?

A. I cannot hardly tell you that.

Q. Were you as far as across this room from where the hill starts down?

A. Yes, sir.

Q. Do you remember, Mabel, is there a street that comes in from the south and comes along past the church up from town along the main street and turns out and comes out at Mr. Byles' house?

A. Yes, sir.

Q. You know where that street is?

A. Yes, sir.

Q. How far were you from that street, Mabel?

A. Well, I was quite a ways.

Q. Down towards the hill?

A. Yes, sir.

157 Q. Farther down towards the hill?

A. Yes, sir.

Q. You were between that street that we are talking about now and the railroad track, were you? You were between Mr. Byles' house and the railroad track on that side of the house—you were on the south side of the house, were you not?

A. Yes, sir.

Q. There were a lot of trees, were there not, back of you there?

A. Yes, sir.

Q. Now, Mabel, I wish you would describe again how these horses acted when they turned out down there—just describe that again to the jury?

A. Why, you know they were going down the hill at a slow trot, and just then Mr. Freeman saw the train, and the horses saw the train, too, and they tried to get up in that place between the fence and the track.

Q. Did they turn up pretty suddenly?

A. Yes, sir.

Q. And then they rushed across the track.

A. Yes, sir.

Q. Just rushed across the track?

A. Yes, sir.

Q. That was done pretty quick, was it?

A. Yes, sir.

Q. Could you see the train when the horses turned around there?

A. No, sir.

Q. You could not see it when the horses first turned?

A. Yes, sir; it was right there by him when the horses first turned.

Q. Now, you said, Mabel, that when he pulled out there that he was about so far as you indicated there from the track—do
158 you mean that the horses' heads were about that far from the track, do you think?

A. Yes, sir.

Q. The horses' heads were about that far from the track?

A. Yes, sir.

Q. It looked to you, did it not, Mabel, that when the horses turned out there that he was trying to turn them around and pull their heads up against the fence there?

A. No, sir; it looked like he was trying to get his horses to, but the horses tried to get across the track, and the train was right there then—then there was the fence, just a little space to the fence.

Q. And the horses turned out there?

A. Yes, sir.

Q. And you were all the time up on the hill back of him?

A. Yes, sir.

Q. Did you go down to the track after he was run over?

A. Yes, sir.

Q. You went down there, did you?

A. Yes, sir.

Mr. BRIDGES: That is all.

Redirect examination.

By Mr. GROSSCUP:

Q. When the horses turned there was the engine right across the road, was it?

A. Yes, sir.

Q. You saw the horses turn and saw the engine at the same time?

A. Yes, sir.

Q. You saw both at once?

A. Yes, sir.

Q. Now, the distance you indicated was from where you were sitting was about how far—as far as I am from you now?

159 A. Well, I guess from about this step to you.

Q. To where you are?

A. Yes, sir; maybe a little closer, I guess.

Q. To where I am now?

A. Yes, sir.

Mr. GROSSCUP: I think the record ought to show the distance if the court will indicate what the distance the witness has testified.

The COURT: It may be admitted that the distance was a distance of six feet.

Mr. GROSSCUP: That is all.

By Mr. LINN:

Q. Mabel, you were just behind Mr. Freeman up on the hill, were you not?

A. Yes, sir.

Q. And that was the way it appeared to you, was it, from where you were standing up on the hill?

A. Yes, sir.

Q. Looking down at Mr. Freeman, down the hill?

A. Yes, sir.

Mr. LINN: That is all.

Examination of Mabel Wakefield closed.

Mrs. MINNIE KENNEDY, a witness for the defendant-, sworn, testified as follows:

Examination-in-chief.

By Mr. GROSSCUP:

Q. Your name is Mrs. Minnie Kennedy, I believe?

A. Yes, sir.

Q. You reside at Elma?

A. Yes, sir; near Elma.

Q. Do you remember the day that Mr. Freeman was killed at the crossing near Elma?

A. Yes, sir.

Q. Did you know Mr. Freeman at that time?

A. No, sir.

160 Q. You learned that you did at the time he was killed?

A. After he was killed; yes, sir.

Q. On which side—where were you, where did you see Mr. Freeman on that day?

A. He was on the west side of the railroad track coming down the hill to the track.

Q. He was on the Elma side?

A. Yes, sir.

Q. Which side were you on?

A. On the east side, the opposite side.

Q. Were you in the public road?

A. No, sir, I was not directly in the public road; I was right at the side of the road, but not directly in the main part of the road.

Q. Who was with you?

A. Mrs. McDowell.

Q. Which way were you coming?

A. We were going towards Elma.

Q. And Mr. Freeman was coming from Elma, on the opposite

side of the road from —, so that you were facing each other on different sides of the railroad track, but on the same road?

A. Yes, sir.

Q. Where was Mr. Freeman with reference to the grade coming down to the railroad track?

A. He was near the top of the grade.

Q. Was he already coming down the hill when you first saw him?

A. Well, he was just about at the top of the grade.

Q. What was the speed of his horses at that time?

A. Well, they were in a very slow trot.

Q. Well, now, Mrs. Kennedy, what was Mr. Freeman's position in his wagon?

161 A. He was sitting straight in his wagon, looking toward his team.

Q. How did the horses continue to go until they came down to the crossing?

A. About the same speed directly in the road.

Q. At the same speed?

A. Yes, sir.

Q. You say that that was a slow trot?

A. Yes, sir.

Q. Have you any judgment about how fast that would be? Would it be as fast as a person walking, a real fast walker?

A. Well, I do not think it would be quite as fast as a person could walk.

Q. It would be what you would say was about a good fast walk for a person walking?

A. Yes, sir.

Q. What was the speed of the horses up until they got up to the crossing?

A. They continued the same speed all the time I saw them.

Q. Did you see any movement on Mr. Freeman's part?

A. No, sir.

Q. Which way did he continue to look until he got to the crossing?

A. He continued to look straight before him at his horses.

Q. How long did he continue to look straight before him?

A. Well, until the train struck him, I should judge.

Q. Did you hear the train coming?

A. Yes, sir, I heard the rumbling of the train.

Q. The train came up through the cut, towards the crossing?

162 A. Yes, sir.

Q. What particularly attracted your attention to Mr. Freeman?

A. Well, I suppose as I was going that way I happened to notice that there was a team coming that way, and that we would be going to meet him.

Q. Was there anything in connection with the rumbling of the train that caused you to notice a team coming down the hill?

A. At the same time I noticed the team I noticed the rumble of the train, or about the same time.

Q. Did that cause you to give any attention to Mr. Freeman, particularly, do you think, Mrs. Kennedy?

A. Yes, sir.

Q. In other words, the rumbling of the train connected with his driving down the hill secured your attention?

A. Yes, sir.

Q. Did you see him struck by the engine?

A. Yes, sir.

Q. Did you see the engine at all before it came into the road and onto the crossing?

A. Well, just a few feet—I could not say that I did see the engine before it came onto the crossing. It was a very short distance, if I did.

Q. How far back was it?

A. Well, I do not know how far back, I could not say.

Q. Just a short distance?

A. Yes, sir, just a short distance.

Q. Did you see what part of his wagon the locomotive struck?
163 A. It struck about the wheel, the front wheel, about where the seat is located on the farm wagons, just about the front wheel.

Q. You remember, Mrs. Kennedy, where the bank stops up on the Elma side about the distance of across this room from the crossing?

A. The grade there?

Q. To the railroad bank, yes.

A. Yes, sir.

Q. From that point on to the crossing, did you see Mr. Freeman make any movement whatever with his head?

A. No, sir; only just when the locomotive struck him. It appeared to me that just as though when the wagon was struck that he made a motion to jump from the wagon, but up to that time I did not see him move at all.

Q. Did he make any move to stop his horses?

A. No, sir; not that I know of.

Q. Did he make any move to look in either direction?

A. No, sir.

Mr. GROSSCUP: You may take the witness.

Cross-examination.

By Mr. LINN:

Q. When you say that he was trotting his team down the hill you do not mean that they were trotting as a team does on a level road, but were they not jogging down the hill as though the wagon was crowding them and they were holding back to keep the wagon kind of shoved back as horses do usually on a hillside with a wagon hitched to them?

A. I mean that they were trotting along just as they would any-

164 where. The hill is not so very steep, and I do not think the wagon was crowding them, it did not appear to be.

Q. There is a grade there, is there not?

A. Yes, sir; a slight grade.

Q. A wagon will crowd a team, will it not, Mrs. Kennedy, on a grade such as that?

A. Well, it might; I never drove down that way.

Q. Were you not pretty considerably excited when you saw the train coming in that direction and Mr. Freeman driving onto the track, his coming in the direction of the train and you saw that he had not noticed it yet, you were considerably excited, were you not?

A. Yes, sir; I was excited, of course.

Q. Certainly, it was enough to excite any one. Did you notice his team turn out of the road?

A. No, sir; I did not.

Q. You didn't see that?

A. No, sir.

Q. And yet you say that you did see the train the way that it struck him?

A. Yes, sir.

Q. Did you hear the train whistle?

A. No, sir.

Q. What was the first thing that attracted your attention to the approach of the train?

A. The rumbling of the train and seeing him and the team coming at the same time.

Q. But you heard no signals of any kind?

A. No, sir.

Q. No ringing of the bell?

A. No, sir.

Q. Do you think, Mrs. Kennedy, that if he had attempted to stop his team you would have seen him when you did not notice the team swing around to the side?

A. I do not understand your question.

165 Q. You say you did not see the team swing around, or swerve around when it came across the road. Now, I say when you did not notice that do you suppose that you would have noticed him had he attempted to stop his team?

A. Yes, sir.

Q. Let me ask you how rapidly was that team going at the time the train struck it?

A. Well, just about the same gait. About the same as it was the first time I saw them.

Q. Not any faster?

A. No, sir, not that I could notice.

Q. Did he make any attempt to stop them at all?

A. Not that I could notice.

Q. How far were you back from the track?

A. I don't know exactly.

Q. Well, could you estimate the distance?

A. Well, it was not more than—it could not have been more than 200 to 250 feet I think.

Q. About a block or so away—would you say somewhere in that vicinity?

A. Yes, sir.

Q. Had you just turned the corner—had you not just turned the corner of the fence just above the cut?

A. I was well around the corner.

Q. You were well around the corner?

A. Yes, sir.

Q. Did you make any remarks or exclamations at all?

A. We spoke to one another—shall I tell what we said?

Q. Did you turn and look at each other while you spoke?

A. No, sir, we were looking directly at the team.

166 Q. Did you attempt to make any signals to Mr. Freeman?

A. No, sir.

Q. Did you try to attract his attention in any way?

A. No, sir.

Q. Did you turn and look at the train to see how near it was coming?

A. Well, from the position we were we could see the train and the team almost the same instant.

Q. How close was the train to the crossing when you first noticed it?

A. I don't know.

Q. How close was it to Mr. Freeman when you first noticed it?

A. Well, I don't know.

Q. Was it coming pretty rapidly or otherwise?

A. Well, it did not appear to me to run very rapidly; it was a heavy train, or appeared to be.

Q. How far did the train run after it struck him before it stopped, do you remember that?

A. It run until the caboose, I believe it is called, the last car, was on the other side of the crossing or just over the crossing.

Q. How long a train was it?

A. I don't know; I didn't know at the time, but I have heard since that there were 18 or 19 cars. I did not know at the time, but it was a long train. I did not count the cars.

Q. Did you know when the engine reversed steam for the purpose of stopping the train?

A. No, sir.

Q. Could you see, or can you see the rails of the track from where you were back of the corner you have indicated, after you have turned the corner?

A. Will you ask that question again, please?

167 Q. Can you see the rails of the railroad track from the position you were standing in at the time that Mr. Freeman was struck?

A. See the rails at the crossing?

Q. Yes.

A. Yes, sir.

Q. You can see the two rails at the crossing?

A. Yes, sir.

Q. It is a uniform grade then from that right on to the crossing?

A. Yes, sir.

Q. You did not notice or did not see anything to indicate that either Mr. Freeman or the team had seen that train until the train struck them?

A. No, sir.

Q. Mr. Freeman could have seen that train without turning his head very much, could he not?

A. I do not know as to that.

Mr. LINN: That is all.

Mr. GROSSCUP: That is all.

Examination of Mrs. Kennedy closed.

Mrs. — McDOWELL, a witness for the defendant, sworn, testified as follows:

Examination-in-chief.

By Mr. GROSSCUP:

Q. Mrs. McDowell, did you reside at Elma two years ago in April, at the time that Mr. Freeman was killed?

A. I did.

Q. Did you reside in town?

A. No.

Q. You resided on the opposite side of the railroad from the town of Elma, did you?

A. Yes.

Q. You were in company with Mrs. Kennedy that day, were you?

A. I was.

168 Q. Were you in the vicinity of this crossing at the time that Mr. Freeman was struck by that train?

A. Yes.

Q. You were with Mrs. Kennedy?

A. Yes, sir.

Q. You and Mrs. Kennedy were on the opposite side of the public road from the side from which Mr. Freeman was approaching, were you?

A. Yes, we were.

Q. How far back from the railroad track were you and Mrs. Kennedy when you first saw Mr. Freeman?

A. I could not say how far.

Q. How far was it with reference—there is a little grade goes down to the track, is there not? Q. How far was it with reference to that grade?

A. Well, I should judge it was over a block.

Q. Have you any idea with reference to where the road turns to turn down the grade that you were?

A. No, I don't remember.

Q. Were you at a point in the road where you could see the railroad crossing?

A. Yes, sir.

Q. And could you see the little hill or grade on the other side of the railroad crossing coming down to the railroad crossing?

A. Yes, I could see that.

Q. You could see the whole way down?

A. Yes, the whole way down.

Q. Where did you first see Mr. Freeman?

A. Well, he was on the top of the grade, well, just about half way at the edge where the hill begins to slope down to the crossing.

Q. What kind of a vehicle was he in?

A. A wagon.

169 Q. A common two-horse wagon?

A. Yes, just a common two-horse wagon.

Q. What was the speed of his horses?

A. They were in a trot.

Q. What kind of a trot?

A. Well, in a slow trot, they did not seem to go very fast.

Q. Which direction was Mr. Freeman looking?

A. He seemed to be looking right straight at his team.

Q. Now, coming down the hill up until it led onto the crossing, was there any change in the speed of the horses?

A. Not that I could tell.

Q. Did they continue to trot all the way down?

A. They did.

Q. Until they got right onto the railroad crossing?

A. Yes.

Q. Did you hear the train coming?

A. I did.

Q. Could you see the train from where you were?

A. Yes.

Q. You could see it?

A. Yes, I could see it.

Q. Well, could you see the train when you first saw Mr. Freeman?

A. I saw the train first.

Q. Did seeing the train in any way direct your attention to Mr. Freeman as he came down the hill?

A. It did shortly after that, but not at first.

Q. Did it while he was coming down the hill?

A. Yes.

Q. Now, until Mr. Freeman got up to the railroad track, did he make any movement of any kind?

170 A. Not that I seen.

Q. Were you watching him all the time?

A. Yes.

Q. Would you have seen any movement if he had made it?

A. I certainly would have.

Q. Did he look either way?

A. No, he never looked.

Q. Did he slacken the speed of his horses?

A. I don't understand you.

Q. Did he slacken the speed of his horses?

A. No, he did not.

Q. Did he attempt to do anything towards controlling his horses, either to pull them up or anything else?

A. No.

Q. You say the engine strike the wagon, did you?

A. Yes.

Q. You remained, did you, at the same place until the wagon was struck?

A. Yes.

Q. Then you went up to where the accident had occurred?

A. A few minutes after that we did.

Q. How far did the train go before it stopped after hitting the wagon?

A. Quite a little ways; the caboose was right on the crossing or close to it when the train stopped.

Q. Do you remember about how long the train was?

A. No, I didn't notice.

Q. Did Mr. Freeman's horses continue in this slow trot without any perceptible change in the speed of their movements from the top of the hill down to where the train was struck at the crossing?

A. They did.

171 Q. Do you know whether there is any crossing sign at this crossing?

A. Yes, sir.

Q. There is?

A. Yes; there is.

Mr. GROSSCUP: You may take the witness.

Cross-examination.

By Mr. LINN:

Q. Mrs. McDowell, you say he was at the top of the hill when you first noticed him?

A. Yes, about.

Q. Where was the train at that time?

A. I could not say exactly.

Q. Did you hear any signals given by the train?

A. I did not.

Q. Were there any given?

Mr. GROSSCUP: I think the witness has answered the question as far as she can when she says she did not hear any signals.

The COURT: This is cross-examination. Objection overruled.

Mr. GROSSCUP: Defendant- excepts.

The COURT: Exception allowed.

Q. Were there any signals given, Mrs. McDowell?

A. Well, I didn't hear any.

Q. You certainly would have heard them if any had been given, would you not?

A. Yes; I certainly would have.

Q. Now, did you have your eyes constantly upon Mr. Freeman all the time when he was coming down to that track?

A. Well, I might have glanced away, but I was noticing him.

172 Q. You were kind of watching the general outcome of the matter, were you not?

A. Yes, sir.

Q. Did you notice real accurately at the time whether he had control of his team and whether he was trying to handle them as a prudent man would, Mrs. McDowell?

Mr. GROSSCUP: We submit that that is not a proper question.

The COURT: Objection overruled.

Mr. GROSSCUP: Defendant- excepts.

The COURT: Exception allowed.

(Question read.)

By the COURT:

Q. The question is whether you noticed in regard to that particularly?

A. I did; he seemed to have control of his team.

Q. He seemed to have control of it?

A. Yes, sir.

Q. Did you notice that the team turned out as it crossed the railroad?

A. I did not.

Q. Might it not have done so—would you say that it did not turn out?

A. I could not say. I did not see them turn out.

Q. Well, now, if the team turned out and you did not see that, might you not be mistaken when you say that he did not attempt to stop his team? If you failed to see one might you not have failed to see the other?

A. I don't know, it might be.

Q. You were considerably excited, were you not, Mrs. McDowell, when you saw the danger he was in?

A. I was certainly excited some.

173 Q. You naturally were excited. You fully recognized and appreciated the danger he was in when you saw him coming down the hill with the train coming on to him?

A. Certainly I did.

Q. Well, when you say that the team was in a slow trot, were they not just simply jogging downhill trying to hold back the heavy wagon?

A. Well, it did not appear to be a very heavy wagon that I could see.

Q. Will you please answer the question as to whether their movements were no more of a trot than those of a team that were simply jogging downhill holding back on the wagon?

A. Well, they just appeared to be trotting slowly down the hill.

Q. Do you remember what time in the afternoon this accident occurred, Mrs. McDowell?

A. I should judge that it was about four o'clock.

Q. Have you any way of fixing the time?

A. Not exactly.

Q. But you know that it was late in the afternoon?

A. Yes.

Q. Well, now, then, you were practically right in front of the team, were you not, and they were coming towards you, were they?

A. They were.

Q. Well, now, did you notice Mr. Freeman attempt to jump or anything of that kind?

A. No, I don't know as I did.

Q. Did you notice the team moving any more rapidly just as the train came up to it?

A. It didn't appear to.

Q. It didn't appear to?

A. Yes.

174 Q. Seemed to go ahead as though they paid no attention to the train at all?

A. Just the same.

Mr. LINN: That is all.

Examination of Mrs. McDowell closed.

Mr. JOHN LATHAM, a witness for the defendant-, sworn, testified as follows:

Examination-in-chief.

By Mr. GROSSCUP:

Q. What is your name?

A. John Latham.

Q. You are in the employ of the Northern Pacific railway, are you?

A. Yes, sir.

Q. You are in the division superintendent's office, are you not?

A. Yes, sir.

Q. Do you know the time-cards that are in effect on the Ocosta branch of the road, and that were in effect two years ago in April?

A. Yes, sir.

(Paper marked for identification "Defendants' Identification No. 4.")

Q. You may refer to Defendants' Identification No. 4 and state whether or not that was one of the regularly published time-card-in effect in April, 1895.

A. Yes, that is the card.

Q. What time was the freight train going from Tacoma towards Grays Harbor at that time due at Elma?

A. 3.55 p. m.

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Q. That is the time indicated by that card?

A. Yes, sir.

Q. What was the time that it was due at the next station to Elma before reaching Elma?

175 A. Porter is the next station, it was due there at 3.25.

Q. 3.25 it was due at Porter?

A. Yes, sir.

Mr. GROSSCUP: Take the witness.

Cross-examination.

By Mr. LINN:

Q. How often did that train run on that branch?

A. It run every other day, on Mondays, Wednesdays, and Fridays down, and back on the opposite days.

Q. How many trains altogether were there running on that road there regularly at that time?

A. Well, on the card there was that freight and one passenger train.

Q. Did the passenger run every other day?

A. No, sir, the passenger run every day, sir.

Q. I mean that freight?

A. The freight run every other day, yes, sir.

Mr. LINN: That is all.

Mr. GROSSCUP: That is all.

Examination of Mr. Latham closed.

Mr. GROSSCUP: If the court please, I desire to introduce this time-card, marked "Defendants' Identification No. 4."

Mr. LINN: No objections.

The COURT: It may be admitted.

(Paper referred to received in evidence, marked "Defendants' Exhibit No. 4.")

Mr. GEORGE HILGROVE, a witness for the defendant-, sworn, testified as follows:

176 Examination-in-chief.

By Mr. GROSSCUP:

Q. What is your full name?

A. George Hilgrove.

Q. Mr. Hilgrove, what was your employment in April, 1895?

A. Track foreman.

Q. At what place?

A. Between Elma and Montesano, on the branch.

Q. Were you familiar with that crossing in Elma in April, 1895?

A. Tolerably.

Q. Do you know the place where Thomas Freeman was killed at that time?

A. Yes, sir.

Q. How long after Mr. Freeman was killed did you go and look at that crossing?

A. The next morning.

Q. Did you make any measurements there at the crossing there the next morning?

A. No, sir.

Q. Did you make any examinations there generally of the place?

A. Well, I just looked at it and saw where he was killed.

Q. How long after did you go there and make any examination?

A. I could not state positively.

Q. Well, about how long do you think it was?

A. Well, it was perhaps five months.

Q. Were you in charge of that crossing as section foreman?

A. No, sir.

177 Q. You are just familiar with it, are you, in a general way?
A. Yes, I live in a short distance from there; just a few feet.

(Paper handed witness.)

Q. Now, is the fence shown in the photograph, which I now show you, marked "Defendants' Exhibit 2," the fence leading from the right of way, and the fence south of the crossing, been changed since Freeman was killed; is it the same fence?

A. I know it is the same fence from actual observation.

Q. That is what I mean.

A. Yes, sir.

Q. Are the conditions of things with reference to that fence and embankment substantially the same as they were when Freeman was killed in 1895?

A. In what respect?

Q. Is it substantially the same at the same place, or has it been dug out and back since?

A. It has not been dug out or back any more than what the weather has caused the gravel to drop off.

Q. Do you know to what extent the weather has caused the gravel to drop off since that time?

A. No, I don't know; perhaps a foot or a little more.

Q. How far apart are the posts of the fence here which leads down from the right of way to the cattle-guard?

A. About eight feet.

Q. That is the usual distance, is it?

A. Yes, sir.

Q. Do you know how far the telegraph posts are?

A. No, I do not.

Q. Have you been on this ground since?

A. Yes, sir.

178 Q. Is there any indication of there having been any brush or trees at a point between the road crossing the point shown in this photograph about opposite the caboose of the train in "Exhibit No. 2"?

A. There has never been none there since the grading was done.

Q. Since the road was built?

A. Not other than little scrub brush which has grown since the line of track was built, naturally what would grow there within the last two or three years.

Q. There was some brush down opposite the point where the ca-boose is seen in this photograph?

A. Yes, sir; but that is quite a distance down.

Q. Do you know how far that is from the road crossing?

A. That is about 300 feet from the measurement.

Q. Did you make the measurement to that point by rule?

A. I made the measurement with a tape-line.

Q. Did you make any measurements to see how far back and be-yond this bank it is from the railroad crossing?

A. No, sir; not to see how far back that was.

Q. What is your judgment about that?

A. About 45 feet from the center of the track.

Q. What would be about the width of this bank then?

A. I would say about that.

Q. Would a man, then, from a point there in the road, or in a wagon from that point, about 40 feet from the center of the track, have a clear and unobstructed view of the railroad track for a distance of about 300 feet?

A. Yes, sir.

Q. Would he have had at the time this accident occurred?

A. Yes, sir.

Mr. GROSSCUP: That is all.

Cross-examination.

By Mr. LINN:

Q. When was that fence built there? Do you know, Mr. Hilgrove?

A. I could not tell you exactly.

Q. Do you know about the time?

A. I think she was built in '92.

Q. '92?

A. Yes, sir.

Q. Have you noticed recently that the dirt has fallen away from between the posts there so as to leave one of the posts out of the ground?

A. That was that way over a year ago.

Q. It was that way over a year ago?

A. Yes, sir; and how long before that I don't know, but it is a year ago now anyway.

Q. Do you know how far back the post was set from the edge when it was put in?

A. No, sir.

Mr. LINN: That is all.

Redirect examination.

By Mr. GROSSCUP :

180 Q. Can you state by looking at that photograph, supposing that the fence has not been changed since it was originally put up, about how far that post was from the edge of the bank?

A. Well, by looking at the photograph I would think that it had been put—no; I can't say.

Q. It was only put a few feet back, was it not?

A. That is what it would be, a foot or two, a couple of feet back.

Q. Now, is this post that the earth is supposed to have caved away from the post shown in the photograph, west from the railroad track—that is the post that the earth has now caved away from?

A. Yes, sir; and the brush has fallen over.

Q. Is the brush shown in the photograph and the conditions of the post as shown in the photograph substantially as it was at the time that this accident occurred?

A. I think so.

Mr. GROSSCUP: That is all.

Recross-examination.

By Mr. LINN :

Q. Let me ask you whether you noticed all those things particularly at the time, or is this just your general recollection?

A. General recollection.

Q. You did not go there for the purpose of examining minutely for the facts?

A. I did not.

Mr. LINN: That is all.

Mr. GROSSCUP: That is all.

Examination of Mr. Hilgrove closed.

181 Mr. H. B. KRAFT, a witness for the defendant, sworn, testified as follows:

Examination-in chief.

By Mr. GROSSCUP :

Q. Mr. Kraft, you reside at Elma, do you, or near there?

A. Yes, sir, I do.

Q. Do you remember the time that Mr. Freeman was killed, in April, 1895?

A. Yes, sir.

Q. How long after he was killed did you go down to the crossing where he was killed?

A. I crossed it that same evening.

Q. You crossed it that evening?

A. Yes, sir; about half past five.

Q. Had you learned of his being killed?

A. Yes, sir, I had.

Q. Was that your usual crossing?

A. Yes, sir; I crossed that crossing from the 30th day of December, 1894, to the 1st day of July, 1896, from two to six times a week every week.

Q. Did you live on the opposite side of the track from Elma?

A. No, sir, I did not; I lived in Elma and worked on the other side of the track.

Q. You remember the grade that comes down to the railroad track?

A. In the public road?

Q. Yes.

A. Yes, sir.

Q. Now, I will ask you whether a man, paying any attention, if a train were coming he could ordinarily hear a train coming up the grade from the depot to the grade on the highway?

A. If he was at the top of the grade?

Q. Yes.

182 A. Why, I should think he would have no trouble in hearing a train at that point.

Q. Do you remember in your experience of hearing trains at that point?

A. Yes, sir.

Q. From the top of the grade?

A. Yes, sir.

Q. Now, when you crossed there at five o'clock that evening was your attention directed to the condition of this crossing by the fact that Mr. Freeman had been killed there shortly before?

A. Why, no, sir; I just looked at the wagon and the pieces that lay all around there; the horses had gone. I was on horseback myself, and I didn't stop to make any examination.

Q. Have you since that time made any observations of this crossing?

A. Yes, sir.

Q. Is it substantially in the same condition now that it was then except for the brush a distance of about 300 feet down from the crossing?

A. Yes, sir.

Q. There has been no change except that?

A. No, sir; not that I know of that I could notice.

Q. How near to the railroad track would a man in a wagon have to be when he would get a clear and unobstructed view of say 300 feet of the track, from the railroad track?

A. From the railroad track?

Q. How near to the railroad track would he have to be?

A. In a wagon?

Q. Yes.

A. Well, I should judge he would have to be—I could tell how far he would have to be on horseback. Now, I don't remember that I ever noticed in a wagon, but I rode across frequently
183 on a horse and used to look down to see if there would be a train, and I could see down this point where the brush grew

at any time probably, well, 80 feet at least at the least calculation back from the track.

Q. That is when you were on horseback from the track 80 feet you can see a point where the brush grows 300 feet?

A. Yes; where it commenced to grow.

Q. That point is 300 feet down the track?

A. Yes, sir.

Q. And you have measured the distance down to that point, have you?

A. Yes, sir; I counted the rails. It is ten rails from the crossing down to where the brush begins to grow.

Q. And a rail is 30 feet?

A. Yes, sir.

Q. Was that an ordinary horse that you were riding when you made these observations?

A. Yes; just an ordinary pony; not a large horse at all.

Q. You are acquainted with horses and wagons, of course?

A. Yes, sir; to some extent.

Q. Would a man be about the same elevation when he was in an ordinary two-horse wagon as what you were?

A. Well, he would not be quite as high as I would be on the horse.

Q. How much difference do you suppose there would be?

A. Well, if that was a spring seat he was sitting on he would be fully as high; if not, there would probably be six or eight inches difference.

184 Q. Can you get that view from 80 feet back?

A. Yes, sir.

Q. From a distance 40 feet back from the railroad track how much track would a man be able to see from a wagon seat?

A. Before this brush was cut or at the present time?

Q. Before the brush was cut?

A. Well, he would be able to see 500 feet anyway.

Q. He would be able to see 200 feet beyond the brush?

A. I think so from my recollection.

Mr. HUDSON: We object to this testimony unless this witness made some actual measurements to entitle his testimony to some credit. If he is simply guessing at it I would like to know it.

Q. Have you made any actual measurements or observations of it at all?

A. I have made observations passing across there as many times as I did, although I have never actually gone down there to make measurements, but I have often looked down the track as I was crossing, before the brush was cut, as well as since. I have always noticed down the track when I was going to go across, and from this point where the brush begins to grow—I never measured, in fact, I never had any object to do so only as I measured for to see what the distance of a rail was exactly in feet I never measured it but that.

Q. Your idea would be now that it would be actually 200 feet be-

yond the point where the brush grows that a person could see from 40 feet from the center of the crossing?

A. Yes, sir.

185 Q. Did you ever observe a train coming up there as you approached the crossing?

A. Now any farther down to the bottom. I never crossed when a train might be at the crossing or within five or six hundred feet of it.

Q. What, from your experience and familiarity with teams and teaming, would be the ordinary speed in miles of a team going in a slow trot?

Mr. LINN: We object to that. The witness has not shown himself competent to answer.

The COURT: Objection overruled.

A. I would say from three and a half to four miles.

Q. An hour?

A. Yes, sir.

Mr. GROSSCUP: You may take the witness.

Cross-examination.

By Mr. LINN:

Q. Are you sure, Mr. Kraft, that you could see 300 feet down the track when you were 80 feet from the crossing?

A. Why, yes, sir; I am reasonably sure.

Q. When did you make any experiments for the purpose of ascertaining that fact?

A. I never made any experiments for the purpose of ascertaining that fact.

Q. How far is it from the crossing to the brow of the hill?

A. From the railroad crossing to the brow of the hill in the wagon road?

Q. Yes; on the Elma side?

186 A. About 40 feet, I believe.

Q. Now, then, you say you could see a train—that you could see down the track 300 feet when you were still 40 feet farther back up the hill?

A. On a horse; yes, sir.

Q. On a horse?

A. Yes, sir.

Q. How high were you off the ground when you were on that horse?

A. Why, probably eight feet, or something like that I presume.

Q. There is eight feet of a bank there, is there not?

A. I presume about eight feet.

Q. Now, that was all covered with scrub growth of white oaks, was it not?

A. Part of it is.

Q. Well, the whole of it was, was it not?

A. Yes, sir; but right up to the crossing I don't remember that they grow right up to the crossing.

Q. What is your occupation?

A. Well, I am a machinist by trade, but I am doing nothing at the present time.

Q. Have you ever been in the employ of this railroad company?

A. I have not.

Q. To whom did you impart your knowledge of this matter about these conditions there at the crossing?

A. To whom?

Q. Yes.

A. I don't remember of imparting it to anybody.

Q. How high is this brush which you say is growing down
187 the railroad track about 250 or 300 feet. How high did that brush grow at that time?

A. Well, sir, if my recollection of that brush is right, I would say that that brush was all the way from a foot and a half high to probably six or seven feet high. It grows there about that high but back up on the hill it is a little thicker growth. It has been grubbed out considerably lower down towards the track, but on the hillside I don't think it has. It is a little thicker growth higher up on the hill.

Mr. LINN: That is all.

Redirect examination.

By Mr. GROSSCUR:

Q. How high did you say the bank is back about 80 feet back from the track?

A. 80 feet back from the railroad track?

Q. Yes; how high is the public road at 80 feet from the track?

A. Well, 80 feet back is not quite up to the top of the grade, and I suppose that grade is—well, it is a little longer than that, I think the whole grade would be maybe 125 feet up to the level.

Q. When you stated that the brow of the hill was 40 feet back you did not mean the top of the hill, did you?

A. No, sir; my idea of that is with reference to this, this point of ground where the excavation—where it comes down to the point where the road came down.

Q. In other words, coming down from that point it was very nearly level from there on down to the track?

A. Sir?

188 Q. It is pretty nearly level from the track a distance of 40 feet back, is it not?

A. It is probably a little grade.

Q. It is pretty nearly level that far and then it starts up steeper, does it not?

A. Yes, sir.

Q. When you spoke about the brow of the hill you meant the foot of that hill?

A. No, sir; I had reference to the ground in which it has been excavated when I made that remark.

Q. The top of the hill was about 125 feet, was it not, back from the track?

A. Into the road?

Q. Yes.

A. Yes, sir.

Q. Now, then, how deep is the cut in the road a distance of 80 feet back?

A. Well, I would presume about three feet, probably.

Q. Now, then, looking 500 feet down the track, 500 feet down the railroad track, how deep is the cut 500 feet from the road crossing, down the railroad track, how deep is the cut there?

A. On the railroad track?

Q. Yes.

A. I believe that is the beginning of the cut 500 feet from the road, there is probably a little cut there, but I do not think there is very much. That is about the place where the cut begins. Maybe there is a little there.

Q. Now, then, a man 80 feet back from the railroad track on the road and looking down towards the railroad track 500 feet
189 from the crossing, do I understand you he would be able to see over this brush and timber and see a train coming?

A. Well, the brush where it commenced to grow first, next to the track, was of course low; I don't mean to say that a man on horseback can see the rails, but I think he is high enough to see a train. The brush closer to the track was lower than farther up the hill, of course, and I am of the opinion that it is not high enough but what a man could see over and see a train of cars at that point, from sitting on horseback. That is what I have reference to when I say that he could see from a point up on the public road.

Q. You think he could see the top of a locomotive?

A. Yes, I think he could.

Mr. GROSSCUP: That is all.

Cross-examination.

By Mr. HUDSON:

Q. Did you ever make that experiment?

A. No; but I have noticed the train once or twice just about to enter the cut, and I have stopped and waited until it passed. I made no measurements, and could not say exactly in feet what the distance back would be, but I have stopped there and waited a number of times and let the train pass, at a point between 60 and 90 feet back from the track.

Q. How far would the train be down the track then?

A. Well, I stated I thought a while ago that it would be about 500 feet, where it first enters the cut.

Mr. HUDSON: That is all.

190 Mr. GROSSCUP: That is all.

Examination of Mr. Kraft closed.

Mr. B. A. AYLES, a witness for the defendant-, sworn, testified as follows :

Examination-in-chief.

By Mr. GROSSCUP :

Q. Your name is B. A. Ayles, is it ?

A. Yes, sir.

Q. Where do you reside ?

A. At Elma.

Q. What is your occupation ?

A. Well, I have lived on a homestead for about five years until along late in the fall, when I moved in to Elma.

Q. You live in Elma now, do you ?

A. Yes, sir.

Q. Do you know the crossing near Elma, where Mr. Freeman was killed ?

A. I do.

Q. Had you frequently crossed that crossing before he was killed and about that time ?

A. Yes, sir.

Q. Was it on your way to and from your homestead from Elma ?

A. Yes, it was on my way from Elma going to my homestead ; I went that way quite frequently ; yes, sir.

Q. Going back and forth from your homestead to Elma you frequently crossed that crossing ?

A. I did, sir.

191 Q. Did you ever observe how far back from the railroad crossing a man who was looking for a train could see one coming up the grade ?

A. Well, I have crossed back and forth there and I always was very careful in regard to getting caught there with a team. I paid particular attention about never driving in there when I heard a train coming. I do not know that I ever noted just how far I seen a train when I crossed there at different times. I have seen trains when I was going across there and when I have heard them coming up I have noticed them down the cut. I have seen them sometimes further and sometimes not so far.

Q. If a man should stop at the top of the grade on the Elma side going down towards the railroad track, if he were sitting in a common road wagon, driving down that grade, looking from the top of the grade, would he be able to see a train coming up that track, from the top of the grade, on the public road ?

A. He could not from the top of the grade, I don't think.

Q. Would he be able to at any point on the grade, going towards the railroad track ?

A. Yes, I think he would at a point on the grade, somewhere on the grade going down.

Q. How far down the grade ?

A. Well, 40 feet I should say, standing on the ground.

Q. Well, how far from a wagon—how far, sitting on a wagon seat, would he be able to see a locomotive coming up that track?

A. He could see a train ten feet further down.

192 Q. Further down?

A. I mean further up the grade, up the hill.

Q. That would be at a point sixty feet up the grade from the track?

A. No, sir; I think it would be about ten feet further, not much further than ten feet, maybe not hardly ten feet further.

Q. Now, from a distance of 40 feet how far would a man at that time have a clear and unobstructed view of that track?

A. Well, standing at a point from the center of the track 40 feet up the grade I seen Mr. Hilgrove and Mr. Tompkins 700 feet along on that side down the track.

Q. That was recently?

A. Yes, sir.

Q. There have been some bushes cut at a point about 300 feet down the track, have there not, since the accident some time?

A. Yes, sir, I believe so. Those bushes, I have no recollection of ever having seen any bushes there recently; they have been cut down, but how long they have been cut down I could not say. I don't ever recollect of seeing them bushes there where they say they were, not for some time.

Q. From that position 40 feet back from the track would a man at the time this accident occurred have a clear and unobstructed view of the track at a point 300 feet down the track?

A. Yes, sir.

Q. Down to where those bushes were?

193 A. Yes, sir.

Q. How is it about hearing the train coming up that grade there as it comes up to that crossing as one was going down the public road towards the crossing; is it usual to hear a train as it is coming up to Elma from that crossing?

A. Well, I never had any trouble in hearing the train myself, and I have always crossed there, quite frequently, but I have always been very anxious in regard to the train.

Q. Being very anxious you had no trouble in hearing the trains coming up that grade?

A. No, sir; I did not.

Mr. GROSSCUP: That is all.

Cross-examination.

By Mr. LINN:

Q. Mr. Ayles, did you ever try the experiment of listening for a train when the wind was from the west?

A. No, sir; I never made no experiments.

Q. Now, when you say you heard the train, you usually heard the signals of the train, didn't you?

A. Why, yes; I usually heard the signals.

Q. That was what attracted your attention most generally, was it?

A. Well, the signals and the puffing of the train, also.

Q. Suppose that the train had got under headway for coming up that grade and was not puffing much, then you could not hear it so easily, could you?

194 A. Well, I might not, and I might—it would be a little owing to the time. Sometimes a man can hear sounds farther than he can at other times.

Q. Now, as a matter of fact, it is the puffing you hear there more than the rumbling on the rails, is it not, as it comes up the grade?

A. I suppose the puffing is louder than the rumbling on the rails, of course.

Q. Did you ever try the experiment of looking down the track from a wagon seat for the purpose of seeing how far back you could see the train?

A. I never made any experiments, but I had a team of my own and I had a wagon, and as I crossed I used to notice, crossing there back and forth, I used to notice how far I could see down the track, that is what I go by.

Q. If you were 10 feet back from this corner, that is the point that has been fixed at 40 feet from the track, there is a corner of this projection of earth that was left by the two cuts, you know where that is, do you?

A. About 10 feet from this point and 40 feet back there is a projection of earth that comes down there where this curve is, that is where this grade has been taken out, that is, the gravel was taken out for the fill. There is a short shoulder there where this land protrudes there.

Q. There is some bushes on the top of that shoulder, is there not?

A. There is little white oaks and grub brush.

Q. There is some little brushes growing there, too, is there not?

A. I never seen any hazel bushes growing on this point, on this land where this point protrudes out from the wagon road.

195 Q. What do you mean by "that point"—indicate on this map here, if you please. (Showing map to witness.) This is the road coming from Elma, this is the railroad track. Do you mean this point here when you speak of a shoulder?

A. Whereabouts is the wagon crossing the railroad track?

Q. Right there. (Indicating on map.)

A. Now, then, this is west, and that is towards Elma. The point 40 feet from the center of the track there is where I stood when I said I saw these men. I said that 10 feet farther back up there is a shoulder protrudes out and that when a man got that far back up that he could not see a train, but from all the way from that point and for 40 feet up, not that distance, it is 50 feet from the center of the track that a man could see the train down the track, from a wagon and was looking, that he could see a train a distance of 600 or 700 feet. That is, in my recollection, I think he could.

Q. Do you remember of ever having looked at that point for a train? At any time when these white-oak bushes were all in the leaf?

A. I don't remember of ever making any particular examination

for it, only to watch out for myself to take care of myself at the crossing there.

Q. What business are you engaged in at the present time?

A. Well, I am living at Elma in the winter and I used sometimes to hunt some, I buy some furs and ship some. I live on a home-
stead and work in the timber in the summer time.

196 Q. Let me ask you, Mr. Ayles, whether at this time to the best of your recollection with regard to that point there to your judgment whether it is based in your recollection to the formation of the ground there, and the brushes, whether that is based upon your recollection of it as it stands there at the present time, or at the time this accident occurred?

A. Well, sir, my recollection is that it is just the same now as it was. I had my attention called by some of my neighbors with regard to these bushes, and I made the remark that I had no recollection of these bushes, nor I have not. I think they pointed out to me that they had been cut, but I seen no bushes. I have no recollection of any of these bushes now.

Q. You do not recollect that there were bushes growing there at any time?

A. No, sir; I have no recollection of them bushes at all.

Mr. LINN: That is all.

Redirect examination.

By Mr. GROSSCUP:

Q. These bushes are pretty nearly where the track enters the cut are they not?

A. These bushes come down—they bushes are right somewhere about this point 300 feet down farther.

Q. How far back is it where the railroad cut commences—how far back beyond the crossing?

A. Well, the cut commences right at the cattle-guard there.

Q. About how far down does it run towards the bushes?

197 A. It runs down about 300 feet down through the cut.

Mr. GROSSCUP: That is all.

Mr. LINN: That is all.

Examination of Mr. Ayles closed.

Mr. H. R. TAYLOR, a witness for the defendant-, sworn, testified as follows:

Examination-in-chief.

By Mr. GROSSCUP:

Q. You reside in Elma, Washington, do you?

A. Yes, sir.

Q. Did you reside there in April, 1895, at the time that Freeman was killed?

A. Yes, sir.

Q. Were you familiar with the crossing at which he was killed?

A. Yes, sir.

Q. Had you frequently gone over that crossing?

A. Yes, sir, I crossed there pretty often.

Q. In a wagon or on horseback or how?

A. No; I usually crossed it afoot.

Q. Did you recently go there at the request of any one to make an examination of that crossing?

A. Yes, sir; last week at the request of Mr. Hilgrove and Mr. Humes.

Q. Except the cutting of some bushes or brush about 300 feet down the railroad track from the public road crossing, is there any change in the condition of things from what existed at the time

Freeman was killed?

198 A. I think not.

Q. From a distance of 40 feet back from the center of the railroad track at the time that Mr. Freeman was killed on the day of the accident could a man who was looking be enabled to see unobstructedly the track?

A. Well, looking over 300 feet, probably 250 to 400 feet.

Q. For what distance would he have been able to see the railroad train?

A. Well, I do not know; I think he would have been able to see it 500 feet anyhow.

Q. At that time, I mean.

A. Yes, sir.

Q. 500 feet?

A. Yes, sir; I think he could have seen it that far anyhow.

Q. There are no bushes down in this gravel pit down from the track, are there?

A. There are a few little firs down there; a foot or two feet or so, some little firs.

Q. That is clean gravel, is it not?

A. Yes.

Q. That is all gravel there, a good gravel road, also, is it not?

A. Yes, sir.

Mr. GROSSCUP: Take the witness.

Cross-examination.

By Mr. LINN:

Q. When you say that you think a man could see 500 feet down the track you are simply gauging your judgment that the
199 height of these bushes was what has been told you by other parties; that is true, is it not?

A. No, sir; I saw no bushes there at the time of the accident. I crossed that crossing at the time of the accident and I knew how high the bushes were.

Q. Did you look at any time for the purpose of ascertaining how far a man could see a train approaching?

A. No, sir; I never was there at that time to make any such an observation.

Q. You never was there at any time and made an observation when a train was coming to see how far you could see it?

A. No, sir; I never was there when a train crossed.

Mr. LINN: That is all.

Mr. GROSSCUP: That is all.

Examination of Mr. Taylor closed.

Mr. GEORGE E. HOUCKS, a witness for the defendant-, sworn, testified as follows:

Examination-in-chief.

By Mr. GROSSCUP:

Q. Mr. Houcks, you were the engineer in charge of the train at the time Mr. Freeman was killed at the crossing near Elma, were you?

A. Yes, sir.

Q. What was the size of that train?

A. It was about 17 cars.

Q. How many of them were loaded?

A. I think seven of them.

Q. It was a freight train, was it?

A. Yes, sir.

200 Q. What is the grade from the bridge below Elma up to the point where this accident occurred?

A. Well, it is both down and up. It is a little downgrade from leaving the bridge up to very near the whistling post, and then it is a slight grade from there to very close to the crossing, and then the grade is a little heavier from there up to the curve.

Q. How far is the curve from the road crossing?

A. It is about 800 feet.

Q. What time did your train leave Porter that afternoon?

A. At 3.25.

Q. Did you leave Porter on time?

A. Yes, sir.

Q. What time did your train arrive at Elma?

A. We arrived at the crossing at 3.46.

Q. What time were you due at the station at Elma?

A. At 3.55.

Q. Were you substantially on time?

A. We were.

Q. What is the distance between Porter and Elma?

A. Nearly six miles.

Q. You left Porter at what time?

A. 3.25.

Q. How far is the crossing where Freeman was killed from the station at Elma?

A. Very nearly a half mile.

Q. And it usually takes the difference in your time between this

crossing, or how long did it take to run from this station to the crossing, or from the crossing to the station at Elma?

201 A. Possibly two minutes and a half or three minutes, according to the speed we were going.

Q. You were due to leave Elma at 3.55?

A. 3.55; yes, sir.

Q. So that you arrived there at what time?

A. Well, it was about 3.43, 3.44, or 3.45.

Q. Then you were substantially on time on this day?

A. Yes, sir.

Q. How fast were you running as you were coming up that grade?

A. Not to exceed fifteen miles per hour.

Q. Well, what would be your speed then?

A. Just about 15 miles an hour.

Q. Usually before you got to that crossing did you notice your fireman doing anything?

A. He got down to put in fire.

Q. Is that usual?

A. Well, whenever he thinks it is necessary, that is a part of his work.

Q. On which side of your engine were you located with reference to Elma?

A. On the opposite side.

Q. On the opposite side?

A. Yes, sir.

Q. Were you at your usual post?

A. Yes, sir.

Q. That is the position you occupy in your duty as engineer, is it?

A. Yes, sir.

202 Q. At a point 100 feet or 150 feet from the road crossing would you be able to see a team or a man or any object approaching the railroad track from the side towards Elma until you got close to him or until he got quite close to the track?

A. No, sir; I could not see him until he got close by.

Q. Why?

A. On account of the boiler projecting out. The boiler would be between me and the man.

Q. Does your point of observation afford you opportunity of seeing the track ahead of you?

A. Yes, sir.

Q. And not the opposite side for any distance ahead?

A. Not close, no sir.

Q. How far back—suppose that you were a distance of 200 feet from this road crossing when a team was 40 feet from the center of the track at the crossing, would you be able to see a team approaching the track on account of the boiler as you have stated from your point of observation?

A. Well, hardly.

Q. They would have to get closer before you could see them?

A. Yes, sir.

Q. When you got to them or at least within a few feet of them as they approached?

A. Yes, sir.

Q. Until they got right up to the track?

A. Yes, sir.

Q. And that is on account of the construction of the locomotive boiler?

A. Yes, sir.

203 Q. That was the usual locomotive, built in the usual manner?

A. Yes, sir.

Q. On the day of this accident how near the crossing were you before you saw any impediment in your way?

A. I should judge about one car-length, about 30 feet.

Q. What did you do?

A. I saw the horses' heads and shoulders, their necks with their fore feet coming in this shape——

Q. What did you do?

A. I reversed the engine and set the air.

Q. Did you do that as quickly as you could?

A. Yes, sir.

Q. And what occurred?

A. I stopped in about nine car-lengths.

Q. Did you strike anything?

A. Oh, yes, we struck the wagon. I could tell from the noise that we had struck them, although I could not see the wagon.

Q. You saw Mr. Freeman on the pilot of the engine, I believe?

A. Yes, sir.

Q. Dead?

A. Yes, sir.

Q. Do you know what your fireman was doing about the time you approached this crossing? Did you observe and see, or do you know simply what he has told you?

A. No; I saw him.

Q. What did he do?

204 A. Up to within a short distance he was sitting on his seat with his body out of the window, or part of his body out of the window, his head and left shoulder was protruding out of the window.

Q. What was he doing?

A. He gave the bell rope a pull and got down and put in a shovel of coal, giving the bell rope a pull as he got down.

Q. Had he put in the coal at the time of the accident?

A. Yes, sir; he was coaling right at this time.

Q. Was it usual for him to put in coal at this time before a grade in preparing for a grade?

A. Oh, yes.

Q. Or does he put in coal whenever he notices that the engine requires it?

A. Whenever he finds that it requires it he puts it in. It is a part of his business to put it in whenever he finds that it requires it.

Q. Where did you blow the whistle for that crossing?

A. Just about the whistling post.

Q. Where is that; how close to the crossing?

A. It is nearly half a mile to the crossing I should judge.

Q. What signals did you give for that crossing?

A. Two long and two short whistles.

Q. What was the schedule of this train; was it a daily train or every other day?

A. Every other day.

Q. You usually got there just about the same time on your regular every-other-day trips, did you?

A. Well, nearly so.

Q. Substantially?

205 A. Yes, sir.

Q. It is usual for you to be on time on that run?

A. Yes, sir.

Mr. GROSSCUP: That is all.

Cross-examination.

By Mr. HUDSON:

Q. How long had you been running that engine or that train prior to this accident?

A. About six weeks.

Q. That is, you never had run it before?

A. Not over that track.

Q. You are still in the employment of the Northern Pacific, are you?

A. Yes, sir.

Q. Running over that road?

A. Not at present.

Q. You say that you gave the usual signal at the signal post?

A. Yes, sir.

Q. Two long and two short whistles?

A. Yes, sir.

Q. And rung your bell?

A. The bell was rung; the fireman was ringing the bell when he got down to put in fire.

Q. When did he ring it?

A. He rung it up until he got down as we were approaching the crossing.

Q. Where did he commence to ring it?

A. Shortly after I sounded the crossing whistle.

Q. Did he keep on ringing it until you got to the crossing?

206 A. Yes, sir.

Q. How did he ring it when he got down to coal?

A. Well, he gave the bell rope a pull when I sounded the whistle, and it was still ringing; he rung it two or three times, and it kept ringing two or three times after he got down to put in fire.

Q. It kept ringing all the time?

A. Yes, sir; it kept on ringing; was sounding yet when the wagon struck the engine.

Q. You occupy the right-hand side of the caboose?

A. I occupy the right-hand side of the cab.

Q. The right-hand side of the cab, I mean?

A. Yes, sir.

Q. From your position there, is the boiler higher in position than your head?

A. Yes, sir.

Q. The boiler of the engine?

A. Possibly very nearly so.

Q. Well, how much does it lack?

A. Oh, possibly a few inches.

Q. Can you look over the boiler or around the side of the boiler or can you look over the end of the boiler and see the smokestack, or the end of the smokestack, or see anything ahead of your train?

A. No, sir; I don't need to look over it.

Q. Do you look around it?

A. No, sir, I look alongside of it.

Q. How far ahead of you on a straight track can you see the entire track?

A. About 30 feet or 35, something like that.

207 Q. Then at a distance of 300 feet how far could you see on the other side of the track; how much space could you see on the other side of the track for a distance of 300 feet?

A. I could hardly say; I never have measured.

Q. You have observed, have you not; can you approximate it?

A. Well, it would be something under 40 feet, I should think, at that distance. I should think not over that distance.

Q. Then were you not on this occasion observing as much—you were not observing as much as 40 feet ahead of you, this distance of 300 feet you were not observing, not looking as far as you could look out of your caboose—you were not looking out as far as you could look from left-hand side of the track, as far as you could see?

Q. I was looking at all I could see from my position, straight in front and on both sides.

Q. You didn't, however, see this wagon at all until you struck it?

A. No, sir.

Q. Did you see it at all?

A. I didn't see the wagon at all, no, sir; the first I saw was the horses' heads.

Q. You saw the horses' heads?

A. Yes, sir.

Q. The front part of the horses?

A. Yes, sir.

Q. When you were right onto them? Your fireman was not looking out then, either?

A. Not at the time.

208 Q. Do you remember how far back from the crossing that he ceased to look out and began to put in coal?

A. I think between 75 and 100 feet.

Q. 75 to 100 feet?

A. Yes, sir, I think so; it was not very far.

Q. Was he on the lookout prior to that time?

A. He was; yes, sir.

Q. On the other side of the cab from you?

A. Yes, sir.

Q. Did your fireman inform you that there was any one approaching the track?

A. He did not.

Q. Was that a dangerous crossing to any one coming from Elma, from the direction of Elma; did you regard that as a dangerous crossing?

A. Well, partially.

Q. Why, Mr. Houcks, was it a dangerous crossing?

A. On account of the small bank being within 40 or 50 feet of the track. I should judge that the track at that point was within that distance.

Q. On account of the cut of the county road, on the public road, I suppose?

A. Yes.

Q. Now, were there any bushes down on the other side of the track from where you were, some two or three hundred feet; that is, on the left-hand side of the track, two or three hundred feet below the crossing which obstructed the view in any way?

A. They never obstructed my view, and consequently I never have noticed whether there were or not.

Q. Your fireman was on that side, was he?

A. Yes, sir.

209 Q. You are quite certain that you gave the four whistles and that the bell was rung continuously from that whistle post up until the time of the accident?

A. I am certain that I sounded the whistle, and that the bell was rung shortly after I sounded the whistle. I do not say that it was ringing right at the time.

Q. And you think that your fireman was on the lookout up to within 75 to 100 feet from the crossing?

A. Yes, sir.

Mr. HUDSON: That is all.

Redirect examination.

By Mr. GROSSCUP:

Q. Would you be able to say with any degree of definiteness how near that was where the fireman got down off his perch to put in coal; how near to the crossing?

A. I should judge that it was inside of three rails' lengths.

Q. And that might vary more or less, might it?

A. Oh, yes. I did not have any idea at the time there was going to be this accident, and I never made any accurate measurements,

and do not know by accurate measurements what it would be in regard to that, but of course I took my judgment of it of his closeness to the crossing, just the same as I would about anything else. I know that it was a very short time before we struck the wagon.

Q. You might be mistaken about it, either way?

A. Oh, yes; certainly.

By Mr. HUDSON:

210 Q. You are sure that it was not much farther than 75 feet, are you; not over 100 feet, was it?

A. I should not think it was over 100 feet.

Mr. HUDSON: That is all.

Mr. GROSSCUP: That is all.

Examination of Mr. Houcks closed.

Mr. O. H. J. ATKINS, a witness for the defendant-, sworn, testified as follows:

Examination-in-chief.

By Mr. GROSSCUP:

Q. You were the fireman on the train this day when Mr. Freeman was killed at the crossing near Elma, were you?

A. Yes, sir.

Q. Do you remember whether or not that train was about on time that afternoon?

A. Yes, sir.

Q. Was it on time, do you say?

A. I think that it was; I think that we left Porter on time.

Q. Did you hear the whistle sound as you approached the crossing?

A. Yes, sir.

Q. That is, at this crossing where Freeman was killed?

A. Yes, sir.

Q. What did you do then with reference to ringing the bell?

A. I rung the bell.

Q. Your duty was to ring the bell, was it?

211 A. Yes, sir.

Q. Before you got to the crossing what did you do?

A. I got down to put in fire.

Q. How far back from the crossing do you think you were when you got down to put in your fire?

A. Well, I don't know exactly; possibly 150 feet or such a matter.

Q. 150 feet back from the crossing?

A. Yes, sir; as near as I can remember.

Q. Do you remember of there being any bushes along there at that place about 300 feet back from the crossing on the side towards Elma?

A. Well, I can't say that I ever paid any attention along the road so that I could say where bushes grow along the track, but I know

that there are bushes growing along the track ; some scrub oaks and such brush as that, but I never pay any attention particularly where brushes are growing along the track. They grow along the track pretty much everywhere in this country.

Q. Was it anywheres near that point where you got down to make fire ?

A. No, sir ; I could not say.

Q. Do you think it was about that far ; or don't you ?

A. Yes, sir ; I think it was somewhere like that.

Q. You made no accurate observation of it at the time ?

A. No, sir.

Q. Did you see any team approaching before you got down to make fire ?

A. No, sir ; I did not.

Q. Did you see anything ahead of you at all ?

212 A. No, sir.

Q. What was the first you knew of the accident ?

A. I heard something grind underneath the engine when we first struck, and then the horses sprung across the track—that was the first I knew.

Q. You do remember on that day of getting down to make fire, do you ?

A. Yes, sir.

Q. And is it a part of your duty to get down and make fire when ever you need fire ?

A. It is my principal duty to make fire and keep up the steam.

Q. It is also a part of your duty to keep on the observation, is it ?

A. Yes, sir ; it is when I am not making the fires ; that is a part of my duty.

Q. But it is a secondary duty to making fire ?

A. Yes, sir, it is a secondary consideration ; making fire and keeping up the steam is the principal work.

Mr. GROSSCUP : You may cross-examine the witness.

Cross-examination.

By Mr. HUDSON :

Q. How long had you been running on that train prior to the accident ?

A. Well, I don't exactly remember ; it seems to me it was a month or such a matter.

Q. Had you ever run on that road before ?

A. Well, I have never been on that run before.

Q. Nor run on that train—had you ever run on the train before ?

213 A. Before what ; how do you mean ?

Q. Had you ever run on the train before as fireman, on this road ?

A. Yes, sir ; I have been in the employ of the Northern Pacific road seven years as fireman.

Q. You are still in the employment of the company, are you?

A. Yes, sir.

Q. You are sure that the whistle was blown and the bell rung on this occasion, are you?

A. Yes, sir.

Q. Where was the whistle blown?

A. About at the whistling post.

Q. How many times?

A. Four times.

Q. You remember distinctly that it was blown four times, do you?

A. Yes, sir.

Q. Do you state that from your memory?

A. Yes, sir.

Q. Are you sure that it might not have been blown but three times?

A. I am positive that it could not have been blown three times.

Q. Do you state that because it is part of your duties and custom to blow it four times?

A. I state it because I remember it.

Q. And you are absolutely certain that the bell was rung?

A. Yes, sir.

214 Q. And you state that from your memory, do you?

A. Yes, sir.

Q. You remember just what occurred on that occasion?

A. Yes, sir.

Q. Do you remember all this so particularly because you were looking out for an accident; were you looking out for an accident on that day?

A. No; I can't say that I was looking out for an accident any more than we are continually watching out when not otherwise engaged.

Q. Do you consider that a dangerous crossing there?

A. Not particularly so; no more than another.

Q. You think that you were about 150 feet from the crossing when you got down to put in that coal?

A. Yes; that is, something like that.

Q. Prior to that you were on the lookout, were you?

A. Yes, sir.

Q. Were you putting in coal when the accident occurred?

A. Yes, sir.

Q. I thought you said that you were ringing the bell just when the accident occurred?

A. Well, I gave the bell rope a pull and set it going, and that bell is heavy enough to keep ringing for three or four times after you quit ringing it. I know that bell well enough to know that it rings for three or four or five times after you let go of the cord.

Q. Do you remember how many shovelfuls of coal you put in?

A. I don't remember whether I put in two or three shovelfuls.

215 Q. You remember that just as well as you remember ringing the bell and the blowing of the whistle, do you?

A. Well, no; but I have a regular system of firing, and it was probably two shovelfuls, possibly three, I would not say.

Mr. HUDSON: That is all.

Mr. GROSSCUP: That is all.

Examination of Mr. Atkins closed.

Mr. WILLIAM ROUSE, a witness for the defendant-, sworn, testified as follows:

Examination-in-chief.

By Mr. GROSSCUP:

Q. You were the conductor on the train on the day that Mr. Freeman was killed, were you not?

A. Yes, sir.

Q. Where were you on the train at the time of the accident at the crossing?

A. I was sitting in the cupalo of the caboose.

Q. In the rear of the train?

A. Yes, sir, in the hind car of the train; up in the cupalo, which is about in the center of the car.

Q. How many cars were there in the train?

A. I had 17 cars; 18 with the caboose, all told.

Q. What was the length of that train?

A. Well, the cars would average about 34 feet. In our train there were some longer and some shorter, but that is about the average length of the train.

216 Q. The average would be about 34 feet to a car in your train?

A. Yes, sir.

Q. How were you as to being on time?

A. We were right on time.

Q. Did you leave Porter on time?

A. Yes, sir; I had a couple of minutes' time at Porter.

Q. You were going into Elma on time, were you?

A. We were getting into Elma two minutes ahead of time if it had not been for the accident.

Q. You had to stop your train on account of the accident?

A. Yes, sir.

Q. What was the speed of your train?

A. About 15 miles an hour and not to exceed that. Our running time was about 12 or 14 miles an hour between those two stations.

Q. So you were going to get in there about on time?

A. Yes, sir.

Q. Did you see anything of Freeman until after he was killed?

A. No; I did not see him.

Mr. GROSSCUP: You may take the witness.

Cross-examination.

By Mr. HUDSON:

Q. Were you looking at the track when the accident occurred?

A. No; I was sitting in the conductor's seat looking out over the train.

Q. Could you see the track ahead of the train?

217 A. No, sir.

Q. What obstructed the view of the track?

A. Why, sitting directly in your seat in the cupalo of the caboose you could not see the track ahead over 17 cars and the engine.

Q. You cannot see over?

A. No, sir; you cannot see down in front of the train; might see the track on curves or something of that kind.

Q. You say that that train was 18 cars long with the caboose?

A. Yes, sir.

Q. And the average length of these cars would be about 34 feet long?

A. Yes, sir.

Q. How many feet between the cars?

A. Well, they vary from two to three feet, according to the couplings.

Q. That would make the train somewhere about 800 feet, would it not, 700 or 800 feet long?

A. Yes, sir; I never figured it up.

Q. How far did the train run after the accident?

A. From the time we struck the crossing it ran, I should judge, about 300 feet, about eight cars with the engine over the crossing.

Q. That was upgrade there, was it not?

A. Slightly upgrade, yes, sir; but not a very heavy grade; it is heavier upgrade up right at the crossing.

Q. How long had you been running on that line at this time?

A. I have run on that run for the last five years, more or less.

218 Q. Are you still running on that run?

A. No, sir; I am not on that branch; I am still on the line.

Q. You are still in the employ of the railroad company?

A. Yes, sir.

Q. Was it not sometimes, or customary to at times divide that train to go up the grade there when heavily loaded, going into Elma?

A. No, sir; never in my life have I ever doubled into Elma, and I have hauled in 35 to 40 cars there with one engine.

Mr. HUDSON: That is all.

Redirect examination.

By Mr. GROSSCUP:

Q. Did you observe whether the train whistled before getting to this crossing?

A. Yes, sir; he made the crossing whistle before he struck, and before he made the stop—

Mr. GROSSCUP: That is all.

By Mr. HUDSON:

Q. Before he came to a stop?

A. Yes, sir.

Q. Did he whistle down at the post?

A. Yes, sir; I judge it was at the post he whistled, but of course I didn't pay any attention until he got up to the crossing.

Q. You cannot tell whether it was just preceding the accident, or after it had struck that he whistled?

A. Oh, he whistled before he had the accident.

Mr. HUDSON: That is all.

Examination of Mr. Rouse closed.

219 Mr. GROSSCUP: If the court please, that is the case for the defendant-, and we rest.

Defendant- rests.

Mr. LINN: I do not think that we shall have any more evidence, and if we do have, it will be very short, but we would like your honor to adjourn over for the day, and let us decide what we shall do about introducing rebuttal.

The COURT: We will take our adjournment now until next Tuesday morning at 10 o'clock.

Thereupon, the court ordered an adjournment until Tuesday morning, February 23, 1897, at 10 o'clock.

TACOMA, WASHINGTON,
TUESDAY, February 23, 1897—10 a. m.

All present; proceedings continued pursuant to adjournment.

Mr. LINN: If your honor please, the plaintiff has decided to introduce no testimony in rebuttal now. We rest.

Plaintiff rests.

Testimony closed.

Thereupon, after the close of the testimony and before the argument of counsel, defendants' counsel handed to the court the following instructions requested by defendant- to be given to the jury, as follows, to wit: Defendants' requests Nos. 1, 2, 3, 5, 6, 7, 8, 9, 10, and 11.

220 And plaintiff's counsel also handed to the court instructions requested by the plaintiff, to wit: Plaintiff's requests, Nos. —, —, —, —, —, —, —, —, —, —.

Whereupon, after the argument of counsel for the respective parties the court gave to the jury the following instructions:

GENTLEMEN OF THE JURY: At a place where a railroad crosses a public highway the railroad company and the public in general have mutual rights and mutual obligations. I mean by that, that

individuals using the highway and going across the railroad track have the rights of the public, in a public place. They have the right to cross the railroad track at that particular place designated and prepared for crossings. They have an obligation towards the railroad as well as an obligation to care for their own personal safety. The rights of the individuals are to cross in safety; the obligation of the individuals are to give way to a railroad train, for they cannot both cross at the same time. When a train is on the track it is not required to stop for either individuals or wagons. Individuals and wagons are required to stop for the train to pass.

The obligations of the railroad company are to observe caution in such places, to look out and see that the crossing is clear so that they can cross and pass without inflicting injury, and to give timely warning of the approach of a train from either direction towards a bridge or crossing, so as to prevent the coming in contact with persons or vehicles at such a place.

It is the duty of the men in charge of the train to be on
221 the lookout at crossings, and to give warning signals in time, and to run at a reasonable rate of speed in entering a station in large villages, and in places where the streets of a city are thronged with persons and vehicles, it is the duty of the railroad company to go slow.

In crossing county roads they are not obligated to slow up, but should have the train under command, so as to be able to stop if it should be necessary for them to stop the train in order to avoid a collision with persons and inflicting an injury.

To fail to exercise the prudence and caution that is required and owed to people in danger, and to inflict injury in such places, is negligence.

It would be negligence to run a train across a public highway without being on the lookout to see what persons or objects might be at that crossing; to fail to give warning signals in time of the approach of a train at the crossing of a public highway is negligence.

And just so on the part of an individual about to cross a railroad track to fail to look both ways, up and down the track, and listen for signals, and stop if necessary in order to be able to hear if the train should be approaching, would be negligence on the part of an individual.

It would be negligence on the part of an individual if he had looked and saw that the train was approaching, or if he had heard it, to proceed in trying to get across ahead of the train when the train was so near as to endanger his safety in doing so, that would be negligence.

It would be negligence for a person driving a team of
222 horses, if he saw or heard the train approach, to drive his team so near to the track before stopping as to get himself in danger if his horses should become frightened and become unmanageable.

These are simple rules of common sense which experience teaches are necessary, and should be observed in order that the crossings of

railroads on public highways can be used by the public and the railroads without causing injury or damage. And they are the rules of law; they are the rules which you are required as jurors to apply in the determination of this case.

To entitle the plaintiffs to recover in this case it is incumbent upon them to establish by at least a fair preponderance of the testimony the fact that there was negligence on the part of the employees of the railroad company in handling the train which came into collision with Freeman, and caused his death. There is no controversy but what the injury was inflicted and that the train struck Freeman, collided with him and caused his death.

To entitle the plaintiffs to recover they must prove by at least a fair preponderance of the testimony that there was negligence on the part of the men in charge of the train at the time which caused the collision. Negligence in failing to blow the whistle and ring the bell to give warning, or negligence by reason of failure to be on the lookout or in the way in which the train was handled, and such negligence must appear from the testimony positively, by at least a fair preponderance of the testimony to entitle the plaintiffs to recover at all.

If you find from a consideration of the testimony in this case it is proven that there was negligence on the part of the railroad company, then you must consider the defense that is interposed here; that is, that Freeman, who was killed, was himself guilty of negligence which was a contributing cause of the collision which produced his death.

If he was negligent in this, that he failed to look to see the train or listen to hear it when he might have seen or might have heard it, if he had been attentive, if he was negligent in proceeding to try to drive his team ahead of the train when approaching under circumstances which caused him to be in danger, or if he was negligent in driving his team so near to the track before attempting to stop, and he was unable to control his team by reason of his horses being so near the locomotive that they were frightened by it, then the defense that is set up here is a complete one, and entitles the defendant to a verdict, because the law does not award compensation for injuries which are self-inflicted, or which are even in part caused by the negligence, or neglect of the injured person to observe due care for his own safety.

To be accurate in this case, certain instructions which have been prepared in writing and which are found to be correct I shall now read to you, and they are to be taken by you as the expression of the law governing this case.

In this case there are two questions of negligence for you to consider; namely, the negligence of the defendants in the operation of their train, and the negligence of the party killed, and for whose death this suit is brought.

The burden of proving the negligence of the defendants is upon the plaintiffs, and the burden of proving the negligence of the deceased and that his negligence contributed to the production of the accident that resulted in his death is upon the defendants.

224 If you believe from the evidence that the employees of the defendant were guilty of negligence in the operation of the train that killed Freeman, and that it was due to their negligence that he was killed, then your verdict should be for the plaintiffs, in case you find that they were entitled to his support or that he was a man capable of supporting them, unless you find that the said Freeman was negligent in the manner in which he approached the crossing, and that his negligence contributed to the production of the collision.

It is the duty of a person approaching a railroad crossing to look and listen for trains, and to do all that a man of ordinary prudence would under the circumstances to avoid a collision, but if he exercises ordinary prudence, and this still does not avail him, and he is killed by reason of the negligent manner in which the train is run, then his widow and children can recover damages for his death.

Whether the employees of the defendants were negligent in the manner in which they were operating the train is a question for you to determine; and if you believe from the evidence that this was a dangerous crossing, that the road upon which the deceased was traveling was a public highway and a road which was much frequented by travelers, and that the whistle was not blown nor the bell rung, and no other signal given as the train approached the crossing, then this would constitute negligence on the part of the defendants.

Where a party cannot see the approach of a train on account of intervening objects, he may rely upon his ears, and whether
225 he should have stopped and listened under the circumstances is for you, and if you believe from the evidence that deceased, Thomas A. Freeman, acted and did as a man of ordinary care and prudence would have done as he approached the crossing, then your verdict should be for the plaintiffs, in case you find that the defendants were negligent, and that the collision was due to their negligence.

There has been some testimony tending to show that the deceased might have seen the approaching train some feet before he reached the track. If you believe that the deceased could have seen the approaching train when he was within a few feet of the track, then it is for you to say, under all the circumstances, whether he used reasonable caution and care to avoid the collision. If he could have seen the approaching train by using proper care and caution under the circumstances, it was his duty to see it, and he would have been guilty of negligence if he did not see it; but if you believe that he did see it, and upon such observation acted as a reasonably prudent and careful man would have acted under like circumstances, then he would not be guilty of contributory negligence which would preclude recovery herein.

You are instructed that if you believe that the deceased was killed by the negligence of the defendants' employees, and without negligence on the part of the deceased contributing to his death, the plaintiffs are entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused

to each of them by such negligence, and in order to assist the jury in making such estimate you have the right to take into
 226 account the fact that according to the standard life and annuity tables the deceased would probably have lived from thirty-one to thirty-three years.

You are further instructed that when a railway company creates or suffers to exist an obstruction to the view at or near a public highway crossing its track, the company then must use such care in operating its trains that, notwithstanding such obstructions, a traveler on the highway may, by the use of ordinary care, avoid a collision at such crossing; and if in this case you believe from the evidence that the view in the direction from which the train was coming, which caused the death of the deceased, was obstructed by the railway company, by its suffering and permitting a thick growth of tall weeds to stand on its right of way at or near said crossing, then it was the duty of the railway company to use such care and caution in operating its trains, that, notwithstanding such obstructions, the deceased, by the use of ordinary care, might have avoided the collision which resulted in his death.

Mr. LINN: In your last instruction, your honor, you read it "tall weeds," which is a mistake of the typewriter, and should be bushes and brush, according to our evidence.

The COURT (continuing): It is written "weeds," but the court instructs you gentlemen, that that should include shrubbery and bushes, or small trees or any kind of an obstruction that would prevent a person from seeing and hearing or impede doing the right thing in the exercise of ordinary care and caution.

There is one exception to the rule which I have stated pre-
 227 cluding the recovery of damages for an injury where the injured person is himself guilty of contributory negligence. That exception is this: When a person has by his negligence put himself in a situation of danger, and a person having charge of a railroad train sees that that other person is in a situation of danger, it is his duty to avoid inflicting injury, if he can do so by the exercise of the utmost care, a person being in a situation of danger on a railroad track, even if the railway has the right of way, if the employees of the railway company in charge of the train see him in time, it is their duty to stop the train and avoid killing a person.

This is illustrated in the case of a child too young to be responsible for its own safety. If a child should get in front of a train on the track, or any other person, instead of going ahead and inflicting great injury or death, it would be the duty of the men in charge of the train, if they saw the person there in time to stop the train, they should do so and avoid an injury, because a person does not forfeit his life by being guilty of negligence, so as to justify the infliction of an injury which might be avoided.

(I give this as a substitute for one of the instructions requested by plaintiffs.)

If you find under the evidence and the instructions of the court that the plaintiffs are entitled to recover damages against the de-

fendant, then in arriving at the amount of such damages you should take into consideration the age of the deceased at the time he was killed, his probable duration of life had such accident not occurred, his mental and physical condition; his ability to earn money
228 and to support and maintain his wife and children; his ability to care for and protect his wife and children, and to educate and train the latter; and the loss to the wife and children because of being deprived of the use and comforts of his society, and the loss of his experience, knowledge, and judgment in managing his and their affairs, and any and all other things which may have appeared in the testimony enlightening you upon this subject.

While the jury should consider the foregoing facts and circumstances in determining the amount of damages, they are sole judges of the amount of damages, and are not bound to itemize the elements of damages, but the law authorizes the jury to fix any sum which in its judgment and under the facts and circumstances of this case would be a just and fair compensation to the wife and children for the loss of the husband and father.

The rule, gentlemen, is compensation. It is not a case which justifies the award of what is called vindictive damages, that is, some amount to be paid by the party inflicting the injury through negligence only to punish him. The object in this case is not the recovery of damages to punish the railway officials, or to punish any one for the negligence of either party, if there has been negligence of either one. But it has reference solely to the sufferers that they should have compensation for their loss, and that no award of damages in the way of punishment of any one should be allowed.

Now, it is very difficult to measure in money the sufferings and loss of the family where the husband and father is suddenly taken from them by any negligent act on the part of some one else.

229 You cannot sit down and calculate how much money you would be willing to receive for the loss of a member of your family, how much you would be willing to bargain for and take in money in consideration of your sufferings if a member of your family were thus taken from you, and it would not be a just rule which the law would recognize and uphold if you should apply any such a test as that in fixing the amount to be awarded as damages. You must take the situation as you find it detailed in the evidence, and agree among yourselves as best you can on what seems to be fair and right in an amount of money to be awarded to the plaintiffs as a gross sum for their compensation.

Whatever sum is agreed upon, if you find for the plaintiffs, should be such a sum as you can all agree upon, and should be according to the result of your combined opinion about the matter, a fair and just sum to award.

I think it is proper for me to caution you not to resort to a method which is often resorted to by jurors in order to agree upon a sum. That is, taking the individual estimate of each member of the jury and adding those different amounts together, and dividing by twelve. If the jury should agree and in arriving at the amount of the award they employed that method, or should make up a ver-

dict arrived at in that manner, and it should be shown to the court that it was made up in that manner, the court would set aside the verdict as being brought about by resorting to improper methods.

You should try to agree upon some sum which all of you think is reasonable compensation.

If the jury believe from the evidence that where the
230 public highway crossed the railroad track and where the accident happened was a difficult place to cross, and that Thomas A. Freeman, the decedent, was acquainted with the place and the difficulty of crossing, he was bound to use reasonable care and caution to avoid injury.

It was the duty of Thomas A. Freeman, the decedent, upon approaching the railroad crossing to exercise that degree of care and prudence for his personal safety which an ordinarily prudent person would do, and if the jury believe from the evidence that the said decedent, by the exercise of that degree of care and prudence would have discovered the approaching train in time to have had the team stopped and avoided the collision, then the plaintiffs cannot recover in this action, unless the jury find from the evidence that the injury was caused by the willful conduct of the persons in charge of the engine, or by conduct so utterly reckless as to show an utter disregard for the safety of the said decedent.

The court instructs the jury that, as a matter of law, it is not the exercise of ordinary care and prudence for a person to drive with a team directly onto a railroad crossing without making an effort by stopping and listening, or otherwise to ascertain whether the train is approaching, or whether it is safe to drive onto the track.

A passing train upon a railroad, from its force and momentum, will have the preference in crossing first, and parties traveling on a highway are presumed to know this fact and to exercise reasonable care and caution in avoiding a collision at the crossing.

If the jury believe from the evidence that the view of the
231 railroad track was obstructed at or near the crossing spoken of in the complaint, and the said Thomas A. Freeman, the decedent, knew this fact, it was his duty to exercise due care and caution to ascertain whether or not a train was approaching said crossing, and the fact that the view was obstructed, if known to decedent, would be reason why he should exercise additional precautions in approaching said crossing.

The jury are further instructed that if they find that the engineer or fireman, or both, failed to ring the bell or sound the whistle, such failure did not relieve the said Thomas A. Freeman, decedent, from the necessity of taking ordinary precautions for his safety. He was bound to stop, listen, or look before attempting to cross the railroad track in order to avoid an approaching train, and not drive carelessly into a place of possible danger.

If the jury believe from the evidence that the said Thomas A. Freeman, the decedent, had used his senses, he could not have failed either to see or hear the train coming, and failed to stop, look, and listen, and drove thoughtlessly onto the track, he was guilty of con-

tributory negligence, and under such circumstances the plaintiffs cannot recover in this action.

If the jury believe from the evidence in this case that Thomas A. Freeman, the decedent, saw the train coming in time to have stopped, and yet undertook to cross the track, instead of waiting for the train to pass, and was killed, the plaintiffs cannot recover in this action.

The fact that defendant or defendants cut down any brush or other obstructions on the right of way at the place or near the place where Freeman was killed since said occurrence, if defendants did so cannot be considered by the jury as any evidence or any admission of negligence on the part of the defendant or defendants at or prior to the time that Freeman was killed.

You are the exclusive judges of the questions of fact in this case, and it is your duty to determine what the facts are from the evidence given upon the trial, without being aided or assisted by any information or suggestions from any other sources, but you should take testimony in this case and decide what the facts are regarding all the material matters according to the testimony, and in determining each disputed question you will be governed by the rule that the preponderance of evidence must be in favor of the party who has the affirmative.

Here the plaintiffs have the affirmative to prove that the railway people were guilty of negligence, that they were guilty of such negligence as caused the death of Freeman; therefore that negligence they must prove, and they must prove it by greater weight of the evidence than the evidence which contradicts.

The defendant affirms and undertakes to prove that the decedent, Mr. Freeman, was guilty of negligence which was a contributing cause of his death. Therefore, the defendant is required to prove that that is so by at least a fair preponderance of the evidence in the case.

To fully get at that, the jury should find in favor of the party who has the negative of each of the questions, if there is no preponderance of the evidence in favor of the party having the affirmative. If you should find the weight balanced as much in favor of one side as the other then in determining a controverted proposition and deciding the case you should find in favor of the party having the negative.

You are the exclusive judges of the credibility of the witnesses. In a point where there is a possibility of harmonizing the statements of different witnesses you should harmonize their testimony and arrive at the truth from the general summing up of the facts as detailed by the witnesses so far as their testimony can be reconciled and harmonized.

When you come to a point where there is a conflict in the statements of different witnesses which you cannot reconcile, then you will decide which to accept and which to reject, and make up your decision accordingly.

In weighing the testimony, if there should be any point of conflict between the different witnesses, you should take into account

all the facts in the case and all the testimony in the case, and consider it as a whole, as well as every part, so as to give due weight to every part, and you are to take into account in weighing testimony the ability of the witnesses to ascertain what the facts are, their opportunities to know what the facts were at the time, their ability to remember and relate them intelligently, and whether they have any interest in the case, so as to have any motive for attempting to influence the jury by giving any false coloring to the facts.

In short, the tests which you should apply in arriving at the truth of a matter where you are acting as jurors are the same as though it were a matter of like importance to each one of you in your business affairs. In other words, when you are sitting as jurors you are called upon to exercise your faculties and call
234 into play your knowledge gained by experience of human nature, which enables you to draw the truth out of the statements of witnesses.

You are to apply just the same rules and tests in determining what the facts are from testimony in court that you would make use of in determining a matter of like importance in your own affairs out of court.

Gentlemen, two forms of verdict will be sent to your jury-room with the papers, and you will adopt whichever one of these forms accords with your decision in the case.

If you find for the defendant, you will use the form which is simply a verdict "for the defendant."

If you find for the plaintiffs, there are three plaintiffs here. Mrs. Freeman is suing in her own right for compensation for what she conceives to be her damage; also she is suing as guardian of her child, a young child two or three years old, for the benefit of that child, and Mr. Freeman had also an older daughter by a previous marriage, who also comes in as one plaintiff, suing for damages which she has sustained.

If you find for the plaintiffs, you will agree upon some sum to be awarded as damages in an entire sum, and then divide it and determine how much to each shall be given, to Mrs. Freeman in her own right, and how much to her for the benefit of her child, and how much for the daughter by the first marriage. Fill in these blanks in the verdict to be signed, so as to specify these different amounts.

When you agree upon a verdict you will have it signed by your foreman and sealed up in an envelope and then left in his
235 custody, and you will then be allowed to separate and come here tomorrow morning when court convenes and render your verdict to the court. Do not inform any one what your verdict is until you come here to render it in court, when you are all together.

You may now retire, gentlemen.

Whereupon, the defendants, after the giving of the foregoing instructions, duly excepted to the refusal of the court to give to the

jury instruction No. 1 as requested by the defendants, which instruction reads as follows:

"On the evidence in this case your verdict must be for the defendants," and said exception was then and there allowed.

The defendants also duly excepted to the instruction given by the court requested by the plaintiffs, reading as follows:

"Where a party cannot see the approach of a train on account of intervening objects, he may rely upon his ears, and whether he should have stopped and listened under the circumstances is for you, and if you believe from the evidence that deceased, Thomas A. Freeman, acted and did as a man of ordinary care and prudence would have done as he approached the crossing, then your verdict should be for the plaintiffs, in case you find that the defendants were negligent, and that the collision was due to their negligence."

The defendants excepted particularly to that portion of said instruction as follows:

"Where a party cannot see the approach of a train on account of intervening objects, he may rely upon his ears, and whether he should have stopped and listened is a circumstance for you,"

236 because it is not warranted by the evidence and is misleading, which exception was then and there allowed by the court.

The defendants duly excepted to the giving of the following instruction requested by the plaintiffs:

"There has been some testimony tending to show that the deceased might have seen the approaching train some feet before he reached the track. If you believe that the deceased could have seen the approaching train when he was within a few feet of the track, then it is for you to say, under all the circumstances, whether he used reasonable caution and care to avoid the collision," for the reason that the admitted facts in the case show that the deceased could have seen the train if he had stopped and looked or listened, but that he did not stop and look or listen, which exception was then and there allowed by the court.

Defendants also duly excepted to the following instruction given by the court at the plaintiffs' request reading as follows:

"If in this case you believe from the evidence that the view, in the direction from which the train was coming which caused the death of the deceased, was obstructed by the railway company by its suffering and permitting a thick growth of tall weeds to stand on its right of way at or near said crossing, then it was the duty of the railway company to use such care and caution in operating its trains that, notwithstanding such obstructions, the deceased, by the use of ordinary care, might have avoided the collision which resulted in his death," because it is not warranted by the evidence in this case, which exception was then and there allowed by the court.

237 Defendants also duly excepted to the giving of the following instruction at plaintiffs' request, which instruction reads as follows:

"If you find under the evidence and instructions of the court that

the plaintiffs are entitled to recover damages against the defendants, then in arriving at the amount of such damages you should take into consideration the age of the deceased at the time he was killed, his probable duration of life had such accident not occurred; his mental and physical condition, his ability to earn money and to support and maintain his wife and children, his ability to care for and protect his wife and children, and to educate and train the latter, and the loss to the wife and children because of being deprived of the use and comforts of his society and the loss of his experience, knowledge, and judgment in managing his and their affairs, and any and all other things which may have appeared in the testimony enlightening you upon the subject," for the reason that the same is not an element of damages, or a correct statement of the rule of damages, which exception was then and there allowed by the court.

Defendants also specially excepted to that portion of the foregoing instruction which reads as follows: "And the loss to the wife and children because of being deprived of the use and comforts of his society," for the reason that the same is not a proper element of damages, and is contrary to law.

Defendants also duly excepted to the refusal of the court to give instruction No. 6, requested by defendants, which instruction reads as follows:

238 "If the jury believe from the evidence that the train approaching the crossing made sufficient noise and gave sufficient alarm, either by whistling or by reason of the noise caused by the engine and train of cars, so that a person approaching the crossing could, by the exercise of reasonable care have heard the approaching train and avoided the injury, then the plaintiff cannot recover in this action," which exception was then and there allowed by the court.

Defendants also duly excepted to the instruction given by the court to the jury, upon its own motion, in relation to the form of verdict which the jury were told they could find a verdict in a gross sum, and then afterward say what proportion should be given to the widow and what proportion should be given to each of the children represented by guardians, which exception was then and there allowed by the court.

Each of the above and foregoing exceptions were duly made and allowed by the court.

Be it further remembered, that on the 24th day of February, 1897, the jury returned into court and rendered a verdict in favor of the plaintiffs and against the defendants, in the sum of \$9,000.00 (nine thousand dollars), and thereafter on the 24th day of February, 1897, in open court, the said counsel for plaintiffs consenting and agreeing thereto, the court gave the said defendants thirty-five days in which to file bill of exceptions in said cause, and a bill of exceptions to the instructions given by the court to the jury, and also thirty-five days in which a motion for a new trial might be filed, and staying execution in said cause for said number of days.

239 And be it further remembered, that thereafter on the 24th day of March, 1897, judgment was entered in said cause in favor of said plaintiffs and against said defendants in the said sum of \$9,000.00, and for costs and disbursements in said action.

Certificate to Bill of Exceptions.

Now, on this 24th day of March, A. D. 1897, the foregoing bill of exceptions, consisting of one hundred and eighty-four pages, having been presented to the undersigned, judge of said court, who tried the cause, by the attorneys for the said defendants, and the same having been duly examined and found correct, and that no exceptions or amendments have been made thereto, and it appearing that said bill of exceptions was served upon plaintiffs' counsel, the same is this day settled, allowed, signed, and sealed as a bill of exceptions in said cause, and as a bill of exceptions to the instructions as given to the jury by the court upon the trial of said cause, and ordered to be made a part of the record in this cause.

I further certify that the said bill of exceptions contains all the evidence given at the trial of said cause, as well as all of the instructions given by the court to the jury, and all of the instructions requested to be given to said jury and refused, together with the exceptions thereto, and the matters, things, and proceedings embodied in the foregoing bill of exceptions are the matters and proceedings

240 and the whole thereof occurring in said cause, and the same contains all the material facts, matters, and proceedings not already a part of the record in said cause.

I further certify that Exhibits "A," "B," "C," "D," and "E," being certified copies of petition and bond and order appointing Mrs. Freeman as guardian, and Exhibit "F," being certified copy of decree of divorce, and Exhibit "G," being certified copy of order appointing Griffin guardian *ad litem*, were introduced in evidence and marked as such exhibits on the part of plaintiff, and are made a part of this bill of exceptions, and the same are the exhibits referred to in this bill of exceptions, and that Exhibits 1 and 2, being photographs, were introduced on the part of the defendant, and Exhibit 3, being a plat, and they are hereby made a part of this bill of exceptions. And in my judgment it being proper and necessary that the original photographs and plat should be inspected in the circuit court of appeals, I order that the same may be transmitted by the clerk of this court to the clerk of the circuit court of appeals, there to be kept until the final disposition of this cause, and then returned to the clerk of this court.

C. H. HANFORD, Judge.

241

PLAINTIFF'S EXHIBIT "A."

STATE OF WASHINGTON, } ss:
 County of Chehalis, }

In the Superior Court of the State of Washington for Chehalis
 County, Holding Terms at Montesano.

I, B. G. Cheney, hereby certify that I am clerk of superior court for Chehalis county, State of Washington, the same being a court of record and having common-law jurisdiction and a seal. And I further certify that the annexed is a true copy of the bond of Mrs. S. O. Freeman, as guardian of Sarah Freeman, minor, as the same now appears of record in my office at Montesano, Washington.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 15th day of February, A. D. 1897.

[SEAL.]

B. G. CHENEY,
 Clerk of Superior Court for Chehalis County.

Know all men by these presents, that we, Sireta O. Freeman, as principal, and Daniel Baker and S. P. Bendixen, as sureties, are held and firmly bound unto the State of Washington, in the sum of three hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents.

The condition of this obligation is such, that if the above-bound Serette O. Freeman, who has been appointed guardian for
 242 Sarah Freeman, shall faithfully discharge the office and trust of such guardian according to law, and shall render a fair and just account of his guardianship to the superior court for the county of —, State of Washington, from time to time, as he shall thereto be required by said court, and comply with all orders of said court, lawfully made, relative to the goods, chattels, and moneys of such minor, and render and pay to such minor all moneys, goods, and chattels, title papers and effects which may come into the hands or possession of such guardian, belonging to such minor, when such minor shall be thereto entitled, or to any subsequent guardian, should such court so direct, this obligation shall be void, otherwise to remain in full force and virtue; which bond shall be for the use of such minor, and shall not become void upon the first recovery, but may be put in suit from time to time, against all or any one or more of the obligors, in the name and for the use and benefit of any person entitled, by a breach thereof, until the whole penalty shall be recovered thereon.

Sealed with our seals, and dated this 30th day of Sept., A. D. 1895.

SERETTA OLLIE FREEMAN. [SEAL.]
 DANIEL BAKER. [SEAL.]
 S. F. BENDIXEN. [SEAL.]

243 STATE OF WASHINGTON, } ss:
 County of Chehalis, }

Daniel Baker and L. P. Bendixen and — — —, each for himself, being duly sworn, deposes and says: I am a resident householder of the county and State aforesaid, and one of the sureties on the above bond, and I am worth the sum of six hundred dollars, over and above all debts and liabilities, and exclusive of property exempt from execution.

DANIEL BAKER.
 L. F. BENDIXEN.

Subscribed and sworn to before me, this 30th day of Sept., A. D. 1895.

J. W. HIMES,
Justice of the Peace, Elma Precinct, Chehalis Co., State of Wash.

Approved this first day of October, A. D. 1895.

MASON IRWIN,
Superior Judge of Chehalis County.

(Endorsed:) Filed in the U. S. circuit court Feb. 20, 1897.
 A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

PLAINTIFF'S EXHIBIT "B."

STATE OF WASHINGTON, } ss:
 County of Chehalis, }

In the Superior Court of the State of Washington for Chehalis County, Holding Terms at Montesano.

I, B. G. Cheney, hereby certify that I am clerk of superior
 244 court for Chehalis county, State of Washington, the same being a court of record and having common-law jurisdiction and a seal; and I further certify that the annexed is a true copy of the letters of guardianship issued to Seretta O. Freeman, as guardian of Sarah Freeman, a minor, and oath of Seretta O. Freeman, as guardian, and the clerk's certificate touching record of letters and oath, as the same now appears of record in my office, at Montesano, Washington.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 15th day of February, A. D. 1897.

[SEAL.]

B. G. CHENEY,
Clerk of Superior Court for Chehalis County.

In the Superior Court of Chehalis County, State of Washington.
 In the Matter of the Guardianship of the Person and Estate of
 SARAH FREEMAN, a Minor.

Letters of Guardianship.

Whereas, Seretta O. Freeman, of Chehalis county, State of Washington, has made application to the superior court of said county

for letters of guardianship of the person and estate of Sarah Freeman, a minor, and having given the bond required by law, now, therefore, the said Seretta O. Freeman is appointed guardian of the person and estate of Sarah Freeman, a minor.

Witness, Hon. Mason Irwin, of the superior court of Chehalis county, State of Washington, and the seal of said court affixed this 11th day of October, A. D. 1895.

J. E. LYONS,

Clerk of said Superior Court.

245 STATE OF WASHINGTON, }
County of Chehalis. }

Oath of Guardian.

I, Seretta O. Freeman, being first duly sworn, on oath depose and say that I am the person appointed guardian of Sarah Freeman, a minor, and that I will perform according to law the duties of my trust as guardian aforesaid. So help me God.

SERETTA O. FREEMAN.

Subscribed and sworn to before me, this 7th day of October, 1895.

J. W. HIMES,

*Justice of the Peace for Elma Precinct, Chehalis County,
State of Washington.*

(Endorsed:) Filed in the U. S. circuit court Feb. 20, 1897. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

PLAINTIFF'S EXHIBIT "C."

STATE OF WASHINGTON, } ss:
County of Chehalis, }

In the Superior Court of the State of Washington for Chehalis County, Holding Terms at Montesano.

I, B. G. Cheney, hereby certify that I am clerk of superior court for Chehalis county, State of Washington, the same being a court of record and having common-law jurisdiction and a seal. And I further certify that the annexed is a true copy of the order appointing Mrs. S. O. Freeman guardian of Sarah Freeman, minor, as
246 the same now appears of record in my office at Montesano, Washington.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 15 day of February, A. D. 1897.

[SEAL.]

B. G. CHENEY,

Clerk of Superior Court for Chehalis County.

In the Superior Court of Chehalis County, State of Washington.
In the Matter of the Estate and Guardianship of SARAH FREEMAN,
Minor. No. 272.

Order Appointing Guardian.

The petition of Mrs. S. O. Freeman, mother of Sarah Freeman, minor child, having on the 12th day of September, 1895, — said application, by petition, to the judge of superior court of this Chehalis county, for the appointment of herself as the guardian of the person and estate of said minor; and afterwards on this 12 day of September, 1895, said matter coming on regularly to be heard, and upon due proof that due notice had been given to the relative of the said minor residing in this Chehalis county, and to the person under whose care said minor is as required by law, and as directed by the judge of this court, said judge proceeded to the hearing of the said application; and it duly appearing to said judge that said minor
247 has no guardian legally appointed by will; that she is a resident of Chehalis county, Washington, and that she has estate within the Chehalis county, of Washington, which needs the care and attention of some fit and proper person:

It is hereby ordered, that said S. O. Freeman be and she is hereby appointed guardian of the person and estate of said minor, Sarah Freeman, minor, and that letters of guardianship of the person and estate of said minor be issued to her upon her giving bond to the State of Washington in the penal sum of three hundred dollars, and upon her taking and subscribing an oath, according to law.

MARION IRWIN,

Judge of the said Superior Court.

This 12 day of September, A. D. 1895.

(Endorsed.)

PLAINTIFF'S EXHIBIT "D."

STATE OF WASHINGTON, } ss:
County of Chehalis, }

In the Superior Court of the State of Washington for Chehalis County, Holding Terms at Montesano.

I, B. G. Cheney, hereby certify that I am clerk of superior court for Chehalis county, State of Washington, the same being a court of record and having common-law jurisdiction and a seal. And I further certify that the annexed is a true copy of the petition of Mrs. S. O. Freeman for appointment of guardian to Sarah Freeman, minor, as the same now appears of record in my office, at Montesano, Washington.

248 In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 15th day of February, A. D. 1897.

[SEAL.]

B. G. CHENEY,

Clerk of Superior Court for Chehalis County.

In the Superior Court of Washington for Chehalis.

In the Matter of the Estate and Guardianship of SARAH FREEMAN and — FREEMAN.

Petition for Appointment of Guardian.

To the Honorable Mason Irwin, judge of the above court:

The petition of S. O. Freeman respectfully shows that your petitioner is the mother of Sarah Freeman and — Freeman, minor children of the late T. A. Freeman; that the said T. A. Freeman died in the said county and State about four months ago; that the said minor has no legal guardian, and she has estate and rights to property in the said county which needs the care and attention of some fit person; that among other of the rights of said minors she says that the said father was killed by being run over by a freight train operated in the said county and State by the Northern Pacific Railroad Company; that such injury and death was caused by and through the negligence of the said railroad company, and the said minor heir is entitled to compensation from the said company for and on account of the death of her said father; that the said Freeman left a small amount of property at the time of his death; that the said Sarah Freeman, minor, is 1 year of age; and the said — Freeman, minor, is — years of age; and the said minor is now in the custody and care of your petitioner.

Wherefore, your petitioner prays that letters of guardianship issue to her appointing her guardian of the person and estate of each of the said minor heirs.

MRS. S. O. FREEMAN.

Subscribed and sworn to before me this 7 day of September, 1895.

J. W. HUMES,

*Justice of the Peace for Elma Precinct,
Chehalis County, State of Wash.*

PLAINTIFF'S EXHIBIT "E."

Marriage License.

STATE OF MISSOURI, }
County of Grundy. }

This license authorizes any judge, justice of the peace, licensed or ordained preacher of the gospel, or any other person authorized under the laws of this State to solemnize marriage between Thomas A. Freeman, of Elma, county of Chehalis, and State of Washington, who is over the age of twenty-one years, and Ollie Booram, of Edinburgh, in the county of Grundy, and State of Missouri, who is over the age of eighteen years.

Witness my hand as recorder, with the seal of office hereto affixed, at my office in Trenton, the 4th day of December, 1893.

[SEAL.]

By DEPUTY H. S. CARNES, Recorder.

250 NOTE.—If the man is under twenty-one or the woman under eighteen add the following: The father giving his name (or mother or guardian, as the case may be) of the said A B or C D, as the case may require, has given his or her assent to the said marriage.

STATE OF MISSOURI, }
County of Grundy, } ss :

This is to certify that the undersigned minister of the gospel did at his residence in said county, on the fifth day of December, A. D. 1893, unite in marriage the above-named persons.

O. E. NEWMAN, *M. G.*

The foregoing certificate of marriage was filed for record in my office on the 21st day of December, A. D. 1893, at two o'clock, p. m.

H. S. CARNES, *Recorder.*

STATE OF MISSOURI, }
County of Grundy, } ss :

I, H. S. Carnes, recorder of deeds, in and for said county, hereby certify the within and foregoing to be a full, true, and complete copy of the marriage record of Thomas A. Freeman and Ollie Booram, as the same is recorded in my office in Marriage Record Book 5, at page 168.

In witness whereof I have hereunto set my hand and official seal at my office in Trenton this 26th day of June, 1896.

[SEAL.]

H. S. CARNES, *Recorder.*

251 (Endorsed:) Filed in the U. S. circuit court Feb. 20, 1897.
A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

PLAINTIFF'S EXHIBIT "F."

In Superior Court, State of Washington, in and for Chehalis County.

THOMAS A. FREEMAN, Pl'ff, }
vs. } No. 664.
NETTIE FREEMAN, Def't. }

Judgment.

This cause coming on regularly to be tried in open court this 26th day of September, 1892, and the court being fully advised in the premises, and having heard the testimony of Thomas A. Freeman, and the deposition of Mrs. Jennie Mogle, the court does find the following facts:

1. Plaintiff and defendant were married in 1881, and ever since have been husband and wife.

2. That on or about June 1st, 1887, the defendant, Nettie Freeman, willfully abandoned the plaintiff without cause, and refused

to longer live with him, and still continues to so abandon plaintiff, and to refuse to live and cohabit with him without cause.

Wherefore, the court doth find the following conclusions of law :

That the above-found facts doth entitle the plaintiff to a decree of full and absolute divorce from the defendant.

Wherefore, it is considered and adjudged by the court that
252 the bonds of matrimony heretofore and now existing between Thomas A. Freeman and Nettie Freeman be and the same are hereby totally and forever dissolved.

[SEAL.]

MASON IRWIN, *Judge.*

Filed Sept. 28th, 1892, and entered on pages 117, 118 of Journal No. 5. H. M. Sutton, clerk, by M. P. Trask, deputy clerk.

STATE OF WASHINGTON :

In the Superior Court, Holding Terms at Montesano.

STATE OF WASHINGTON, } ss :
County of Chehalis, }

I, J. E. Lyons, hereby certify that I am clerk of superior court for Chehalis county, State of Washington, the same being a court of record and having common-law jurisdiction and a seal. And I further certify that the annexed is a true copy of the decree of divorce in case No. 664, Thomas A. Freeman vs. Nettie Freeman, as the same now appears of record in my office at Montesano, Washington.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 15th day of November, A. D. 1893.

[SEAL.]

J. E. LYONS,

Clerk of Superior Court for Chehalis County,

By M. P. TRASK, *Deputy.*

(Endorsed :) Filed in the U. S. circuit court Feb. 20, 1897. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

253

PLAINTIFF'S EXHIBIT "G."

In the Matter of Guardianship *ad Litem* of LENNIE FREEMAN.

Certificate.

STATE OF WASHINGTON, } ss :
County of Pierce, }

I, W. F. Grass, county clerk and clerk of the superior court of the State of Washington, for the county of Pierce, do hereby certify that the annexed is a true and correct copy of the order appointing guardian *ad litem* in the above-entitled matter, now on file in this office.

Witness my hand and the seal of the said superior court this 18th day of February, 1897.

[SEAL.]

W. F. GRASS, *County Clerk,*

By CHAS. PETERSON, *Deputy.*

In the Superior Court of the State — Washington for Pierce County.

In the Matter of the Guardianship *ad Litem* of LENNIE FREEMAN, a Minor. No. 2053.

Order.

The petition of C. E. Griffin, as the friend of Lennie Freeman, a minor under the age of fourteen, to be appointed her guardian
254 *ad litem*, for the purpose of instituting legal proceedings against Andrew F. Burleigh, receiver of the Northern Pacific Railroad Company, for the collection and recovery of a claim for damages for the death of the father of said minor, came on this day for hearing, and the same being heard and considered by the court, and the court being of the opinion that the relief prayed for in said petition should be granted—

It is therefore ordered and adjudged that the said C. E. Griffin be and he is hereby appointed the guardian *ad litem* for said Lennie Freeman, for the purpose of instituting legal proceedings, for the recovery of damages for the killing of T. A. Freeman, the father of said minor, against Andrew F. Burleigh, receiver of the Northern Pacific Railroad Company, and the said railroad company, and the said C. E. Griffin, as such guardian *ad litem*, is hereby authorized and empowered to institute any and all legal proceedings he may deem necessary for the collection and recovery of said claim and the protection of the rights and interests of the said minor therein.

Ordered and adjudged this 27th day of August, 1896.

EMMETT N. PARKER, Judge.

(Endorsed :) Filed in the U. S. circuit court Feb. 20, 1897. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

And afterwards, to wit, on the 18th day of March, 1897, there was duly filed in said court, in this cause, a notice of filing bill of exceptions, in the words and figures as follows, to wit :

255 In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

SERETTE O. FREEMAN, in Her Own Right and as Guardian of Sarah Freeman, a Minor, and Lennie Freeman, a Minor, by Her Guardian <i>ad Litem</i> , C. E. Griffin, Plaintiffs,	}	No. —.
<i>vs.</i>		
NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and The Northern Pacific Railway Company, a Corpora- tion, Defendants.	}	

Notice of Filing Bill of Exceptions.

To O. V. Linn, J. B. Bridges, Sidney Moore Heath, and Hudson & Holt, attorneys for plaintiffs :

You and each of you will please take notice that the defendants in the above action have filed with the clerk of the above court

their bill of exceptions, and exceptions to the instructions given by said court at the trial of the above cause, and now serve a copy of the same upon you.

And you are further notified that they will present said bill of exceptions and exceptions to the instructions given by said court to the Honorable C. H. Hanford, at the court-room of said court, in the city of Tacoma, Pierce county, Washington, on Wednesday, the 24th day of March, A. D. 1897, at the hour of 10 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, and will ask the judge of said court to settle and sign said bill of exceptions and exceptions to the instructions given by said court at the trial, and you are notified to present any amendments to said bill of exceptions within five days after this is served upon you.

CROWLEY & GROSSCUP,

Attorneys for Defendants.

We hereby acknowledge due service of the above notice and said bill of exceptions after filing, at Tacoma, Washington, this 18th day of March, A. D. 1897.

J. B. BRIDGES,

O. V. LINN,

SIDNEY MOORE HEATH, AND

HUDSON & HOLT,

Attorneys for Plaintiffs.

(Endorsed :) Filed in the U. S. circuit court Mar. 18, 1897.
A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

And afterwards, to wit, on Wednesday, the 24th day of March, 1897, the same being the 24th judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

257 In the United States Circuit Court for the District of Washington, Western Division, Ninth Circuit.

SERETTE O. FREEMAN, in Her Own Right and as Guardian
of Sarah Freeman, a Minor, and Lennie Freeman, a
Minor, by C. E. Griffin, Her Guardian *ad Litem*, Plain-
tiffs,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, a Corporation,
and The Northern Pacific Railway Company, a Cor-
poration, Defendants.

No. 537.

Judgment.

Now comes the plaintiffs, by their attorneys, and move the court for a judgment on the verdict heretofore rendered in said action on the 24th day of February, 1897, and no reason appearing to the court why said judgment should not be entered, the time having

elapsed for the filing of a motion for a new trial, and none having been filed—

It is therefore considered that the plaintiffs do have and recover of the defendants, Northern Pacific Railroad Company and The Northern Pacific Railway Company, or either, the sum of nine thousand dollars, so assessed by the jury in their verdict, together with interest from the date of said verdict, and the costs of this action, and that said sum, when so recovered, be apportioned according to the verdict of said jury.

Ordered and adjudged this the 24th day of March, 1897.

C. H. HANFORD, *Judge*.

(Endorsed :) Filed in the U. S. circuit court Mar. 24, 1897. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

And afterwards, to wit, on the 31st day of March, 1897, there was duly filed in said court in this cause the assignment of errors in the words and figures as follows, to wit :

259 In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington.

SERETTE O. FREEMAN, in Her Own Right and as Guardian of Sarah Freeman, a Minor, and Lennie Freeman, a Minor, by Her Guardian *ad Litem*, C. E. Griffin, Plaintiffs,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and The Northern Pacific Railway Company, a Corporation, Defendants.

Assignment of Errors.

Come now the Northern Pacific Railroad Company and the Northern Pacific Railway Company and make and file the following assignment of errors in the above cause, which said defendants and plaintiffs in error will rely upon in the circuit court of appeals for the ninth circuit for relief from the judgment rendered in said cause in the court below.

I.

The court erred in refusing to give to the jury instruction number one, duly requested by said defendants, on the trial of said cause, which instruction reads as follows :

260 "On the evidence in this case your verdict must be for the defendant."

The defendants duly excepted to the refusal of the court to give such instruction, and now assigns such refusal as error.

II.

The defendants also duly excepted to the instruction given by the court requested by the plaintiffs, reading as follows :

"Where a party cannot see the approach of a train on account of

intervening objects, he may rely upon his ears, and whether he should have stopped and listened under the circumstances is for you, and if you believe from the evidence that the deceased, Thomas A. Freeman, acted and did as a man of ordinary care and prudence would have done as he approached the crossing, then your verdict should be for the plaintiffs, in case you find that the defendants were negligent, and that the collision was due to their negligence," and now assigns the giving of such instruction as error.

The defendants particularly excepted to the giving of that portion of said instruction which reads as follows :

"Where a party cannot see the approach of a train on account of intervening objects, he may rely upon his ears, and whether he should have stopped and listened under the circumstances is for you," because such instruction is not warranted by the evidence and is misleading, and defendants now assign the giving of such instruction as error.

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III.

The defendants duly excepted to the giving to the jury of the following instruction, and now assign the giving thereof as error :

"There has been some testimony tending to show that the deceased might have seen the approaching train some feet before he reached the track. If you believe that the deceased could have seen the approaching train when he was within a few feet of the track, then it is for you to say, under all the circumstances, whether he used reasonable caution and care to avoid the collision."

IV.

Defendants also duly excepted, and now assign the same as error, the giving by the court to the jury the following instruction :

"If in this case you believe from the evidence that the view in the direction from which the train was coming which caused the death of the deceased was obstructed by the railway company by its suffering and permitting a thick growth of tall weeds to stand on its right of way at or near said crossing, then it was the duty of the railway company to use such care and caution in operating its trains that, notwithstanding such obstructions, the deceased, by the use of ordinary care, might have avoided the collision which resulted in his death."

V.

Defendants also duly excepted, and now assign same as error, the giving of the following instruction to the jury :

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"If you find from the evidence and instructions of the court that the plaintiffs are entitled to recover damages against the defendants, then in arriving at the amount of such damages you should take into consideration the age of the deceased at the time he was killed, his probable duration of life, had such accident not occurred, his mental and physical condition, his ability to earn means and to support and maintain his wife and children, his ability to care for and protect his wife and children, and to educate

and train the latter, and the loss to the wife and children because of being deprived of the use and comforts of his society and the loss of his experience, knowledge and judgment in managing his and their affairs, and any and all other things which may have appeared in the testimony enlightening you upon the subject."

Defendants also specially excepted to that portion of the foregoing instruction which reads as follows:

"And the loss to the wife and children because of being deprived of the use and comforts of his society," for the reason that the same is not a proper element of damages, and is contrary to law.

VI.

Defendants also duly excepted, and now assign same as error, the refusal of the court to give instruction number six, requested by defendants, which instruction reads as follows:

"If the jury believe from the evidence that the train approaching the crossing made sufficient noise and gave sufficient alarm, 263 either by whistling or by reason of the noise caused by the engine and train of cars, so that a person approaching the crossing could, by the exercise of reasonable care have heard the approaching train and avoided the injury, then the plaintiff cannot recover in this action."

VII.

Defendants also duly excepted to the instruction given by the court to the jury upon its own motion, to the form of verdict which the jury were told they could find the verdict in a gross sum, and then afterwards say what proportion should be given to the widow and what proportion should be given to each of the children represented by guardians, which instruction reads as follows:

"If you find for the plaintiffs, you will agree upon some sum to be awarded as damages in an entire sum, and then divide it and determine how much to each shall be given, to Mrs. Freeman in her own right and how much to her for the benefit of her child, and how much for the daughter by the first marriage. Fill in these blanks in the verdict which will be signed by you as to these different amounts."

VIII.

Defendants also assign as error that the verdict and judgment in said cause, so far as concerns Lennie Freeman, a minor, and in favor of said Lennie Freeman by her guardian *ad litem*, C. E. Griffin, is excessive and not warranted by the testimony, in this, that it appears from said testimony, that said Lennie Freeman was a 264 girl about the age of fourteen years, and that she had not been living with her father, deceased, for a number of years and that he had contributed very little to her support for some length of time, and it appears from the evidence that an award of two thousand dollars to said Lennie Freeman is excessive.

CROWLEY & GROSSCUP,

*Attorneys for Northern Pacific Railroad Company
and Northern Pacific Railway Company.*

(Endorsed:) Filed in the U. S. circuit court Mar. 31, 1897. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

And afterwards, to wit, on the 31st day of March, 1897, there was duly filed in said court, in this cause, a petition for writ of error, in the words and figures as follows, to wit:

265 In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

SERETTE O. FREEMAN, in Her Own Right and as Guardian of Sarah Freeman, a Minor, and Lennie Freeman, a Minor, by Her Guardian <i>ad Litem</i> , C. E. Griffin, Plaintiffs, vs. NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and THE Northern Pacific Railway Company, a Corporation, Defendants.	}
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Petition for Writ of Error.

To the honorable judges of the circuit court of the United States, district of Washington, western division:

Your petitioners, the above-named defendants, conceiving themselves aggrieved by the decision and judgment of the court aforesaid, made and entered herein on the 24th day of March, A. D. 1897, do pray for a writ of error from said decision and judgment to the United States circuit court of appeals, in and for the ninth judicial circuit of the United States, and pray that said writ may be allowed, and that a transcript and record of the proceedings upon which said judgment was rendered, duly authenticated, together with the assignment of errors annexed thereto, may be sent to the circuit court of appeals.

CROWLEY & GROSSCUP,

Attorneys for Defendants.

Now, on this 31st day of March, A. D. 1897, the writ of error herein prayed for is allowed.

C. H. HANFORD,

Judge United States Circuit Court, Ninth Judicial

Circuit, District of Washington.

(Endorsed:) Filed in the U. S. circuit court Mar. 31, 1897. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

And afterwards, to wit, on the 31st day of March, 1897, there was duly filed in said court, in this cause, a bond in the words and figures as follows, to wit:

Bond on Appeal.

Know all men by these presents, that we, The Northern Pacific Railroad Company, a corporation, and The Northern Pacific Railway Company, a corporation, as principals, and A. F. McClaine and

A. R. Nicol, as sureties, are held and firmly bound unto Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and to Lennie Freeman, a minor, by her guardian *ad litem*,

267 C. E. Griffin, and to each of them, in the full and just sum of fifteen thousand dollars (\$15,000.00), to be paid to the said Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, to their heirs, executors, administrators, legal representatives or assigns, to which payment, well and truly to be made, we bind ourselves, our and each of our successors, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of March, A. D. 1897.

Whereas, lately, in the circuit court of the United States for the district of Washington, western division, in an action pending in said court between Serette O. Freeman, in her own right, and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor by her guardian *ad litem*, C. E. Griffin, as plaintiffs, and The Northern Pacific Railroad Company, a corporation, and The Northern Pacific Railway Company, a corporation, as defendants, a judgment was rendered in favor of the said plaintiffs and against said defendants for the sum of nine thousand dollars (\$9,000.00), and costs of action, and the said Northern Pacific Railroad Company and the said Northern Pacific Railway Company having obtained from said court a writ of error to reverse said judgment in the aforesaid action, and the citation directed to the said above-named plaintiffs, citing and admonishing them to appear in the United States circuit court of appeals for the ninth circuit to be holden at San Francisco, in the State of California:

268 Now, the consideration of this obligation is such that if the said Northern Pacific Railroad Company and The Northern Pacific Railway Company, plaintiffs in error, shall prosecute their said writ to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILROAD
COMPANY,

By CROWLEY & GROSSCUP, *Its Attorneys.*

NORTHERN PACIFIC RAILWAY
COMPANY,

By THOMAS COOPER, *Its Statutory Attorney.*

A. R. NICOL.

A. F. McCLAIN.

STATE OF WASHINGTON, } ss:
County of Pierce,

A. F. McClaine and A. R. Nicol, being first duly sworn, on oath, each for himself and not one for the other, deposes and says, that he is a resident and freeholder in the district of Washington, and

that he is worth the sum mentioned in the foregoing obligation over and above all just debts and liabilities, and exclusive of property exempt from execution, in property situated in the State of Washington.

That he is not an officer of the above court, or an attorney-at-law.

A. F. McCLAINÉ.

A. R. NICOL.

269 Subscribed and sworn to before me this 31st day of March,
A. D. 1897.

[SEAL.]

A. G. AVERY,

*Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.*

The foregoing bond and the surety thereby offered is hereby approved this 31st day of March, A. D. 1897.

C. H. HANFORD

*District Judge, Sitting as Judge of the United
States Circuit Court, Ninth Judicial
Circuit, District of Washington.*

(Endorsed:) Filed in the U. S. circuit court Mar. 31, 1897. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

Clerk's Certificate as to Cost of Transcript.

UNITED STATES OF AMERICA, } ss:
District of Washington,

I, A. Reeves Ayres, clerk of the United States circuit court, for the district of Washington, do hereby certify that the cost of the record in the foregoing-entitled cause of Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, vs. Northern Pacific Railroad Company, a corporation, and The Northern Pacific Railway Company, a corporation, amounts to the sum of seventy-nine and $\frac{1}{10}$ dollars, and that the same has been paid by the defendants in error.

270 In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Tacoma, this the 19th day of April, A. D. 1897.

[SEAL.]

A. REEVES AYRES, Clerk,

By SAM'L D. BRIDGES, Deputy.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, } ss:
District of Washington,

I, A. Reeves Ayres, clerk of the United States circuit court, for the district of Washington, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages,

numbered 1 to 239, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, plaintiffs in error, against Northern Pacific Railroad Company, a corporation, and The Northern Pacific Railway Company, a corporation, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court at the city of Tacoma, Washington, this the 19th day of April, A. D. 1897.

[SEAL.]

A. REEVES AYRES, *Clerk*,
By SAM'L D. BRIDGES, *Deputy*.

271

Writ of Error.

UNITED STATES OF AMERICA, ss :

The President of the United States of America to the judges of the circuit court of the United States, ninth circuit, in and for the district of Washington, western division, Greeting :

Because of the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, plaintiffs, and The Northern Pacific Railroad Company and The Northern Pacific Railway Company, defendants, a manifest error hath happened, to the great damage of the Northern Pacific Railroad Company and the Northern Pacific Railway Company, and each of them as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the ninth circuit, at San Francisco, California, together with this writ, so that you have the same at the said place within thirty days from the date hereof in said court, to be there and then held, that the record and proceedings aforesaid be inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 31st day of March, in the year of our Lord one thousand eight hundred and ninety-seven and of the Independence of the United States the one hundred and twenty-first.

[SEAL.]

A. REEVES AYRES,
*Clerk of the United States Circuit
Court, District of Washington*,
By SAM'L D. BRIDGES, *Deputy*.

(Endorsed:) Filed in the U. S. circuit court Mar. 31, 1897. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

Citation.

UNITED STATES OF AMERICA, ss :

To Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, and each of you, Greeting :

You and each of you are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit, in the city of San Francisco, State of California, within thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, district of Washington, western division, wherein The Northern Pacific Railroad Company, a corporation, and The Northern Pacific railway, a corporation, are plaintiffs in error, and you Serette O. Freeman, in her own right, and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should be done to the parties in that behalf.

Dated this 31st day of March, A. D. 1897.

C. H. HANFORD,
*United States District Judge, Presiding
in the said Circuit Court.*

Attest :

[SEAL.]

A. REEVES AYRES,
Clerk United States Circuit Court, District of Washington,
By SAM'L D. BRIDGES, Deputy.

We her-by acknowledge due service of the citation on appeal in the case wherein Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, are plaintiffs and defendants in error, and The Northern Pacific Railroad Company and The Northern Pacific Railway Company are defendants and plaintiffs in error, at Tacoma, Pierce county, Washington, this 1st day of April, 1897.

HUDSON & HOLT,
SIDNEY MOORE HEATH,
*Attorneys for Lennie Freeman, a Minor, by Her
Guardian ad Litem, C. E. Griffin.*

O. V. LINN &
J. B. BRIDGES,
*Attorneys for Serette O. Freeman, in Her Own
Right and as Guardian of Sarah Freeman, a Minor.*

(Endorsed:) Citation. Filed in the U. S. circuit court March 31, 1897. A. Reeves Ayres, clerk, by Sam'l D. Bridges, deputy clerk.

Clerk's Certificate as to Drawings and Photographs.

UNITED STATES OF AMERICA, } ss:
 District of Washington,

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, do hereby certify the drawing and photographs hereto attached to be the original Defendants' Exhibits One (1), Two (2), and Three (3), filed in the case of Serette O. Freeman *et al.*, plaintiffs, *vs.* The Northern Pacific Railroad Company *et al.*, defendants, cause number 404 in said circuit court.

In testimony whereof, I have hereunto set my hand and the seal of said circuit court this 21st day of April, A. D. 1897.

[SEAL.]

A. REEVES AYRES, *Clerk*,
 By SAM. D. BRIDGES, *Deputy*.

275 (Endorsed:) No. 365. N. P. R. R. Co. *vs.* Freeman *et al.*
 Rec'd April 24, 1897. F. D. Monckton, clerk.

(Endorsed:) No. 365. In the United States circuit court of appeals for the ninth circuit. Northern Pacific Railroad Company *et al.*, plaintiffs in error, *vs.* Serette O. Freeman *et al.*, defendants in error. Transcript of record. In error to the circuit court of the United States for the district of Washington, western division, Tacoma.

Filed April 24, 1897.

FRANK D. MONCKTON, *Clerk*,
 By MEREDITH SAWYER,
Deputy Clerk.

(Here follow photos and drawing marked pp. 276, 277, & 278.)

279 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY ET AL., Plain-	} No. 365.
tiffs in Error,	
v.	
SERETTE O. FREEMAN ET AL., Defendants in Error.	

In error to the circuit court of the United States for the district of Washington, western division.

Crowley & Grosscup, for plaintiffs in error.
 J. D. Bridges, for defendants in error.

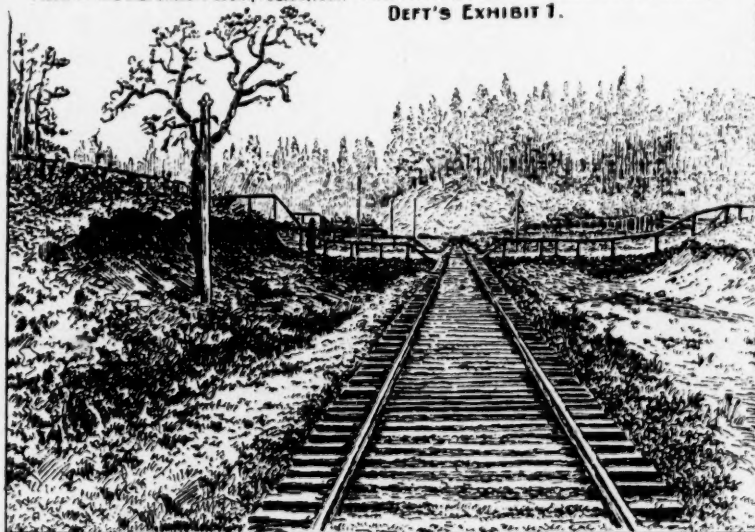
Before Gilbert, Ross, and Morrow, circuit judges.

GILBERT, *Circuit Judge*:

The widow and the three minor children of T. A. Freeman brought an action against the Northern Pacific Railroad Company to recover damages on account of his death. The decedent, just prior to the

No 241.
N.P.R.C. } p. 276
Gunnar

FILED IN THE U.S. CIRCUIT COURT, FEB. 20, 1897.-A. REEVES AYRES CLERK -SAM'L D. BRIDGES, DEP.
DEPT'S EXHIBIT 1.



County Road Crossing $\frac{1}{4}$ mile East of Elma on U.R.R. of W. Looking Northerly.

Photo taken Tuesday, Jan. 7, 1894, by C. E. S.

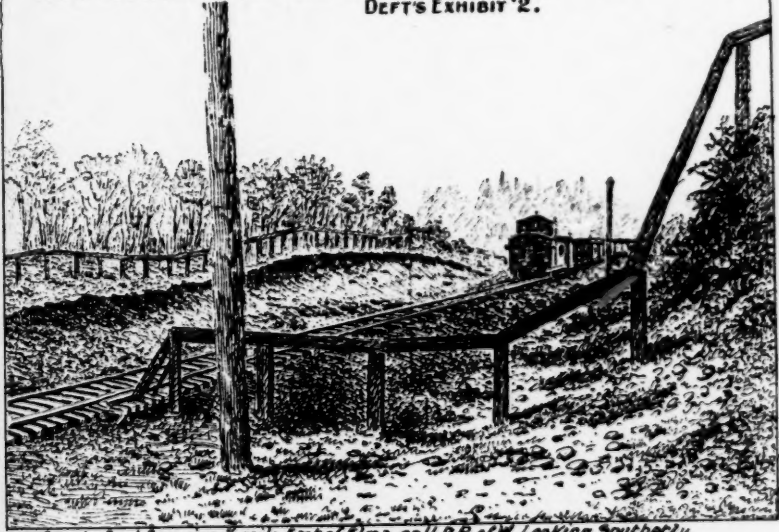
Camera at (2) in centre of track, 300 ft. Southerly from centre of road crossing.

J. W. B. standing in centre of County Road at (1) 40 ft. West of crossing.

Width of cut varies from 80 to 85 ft. near road crossing.

No. 241.
 N.P. Ry. Co. } p 277
 Freeman

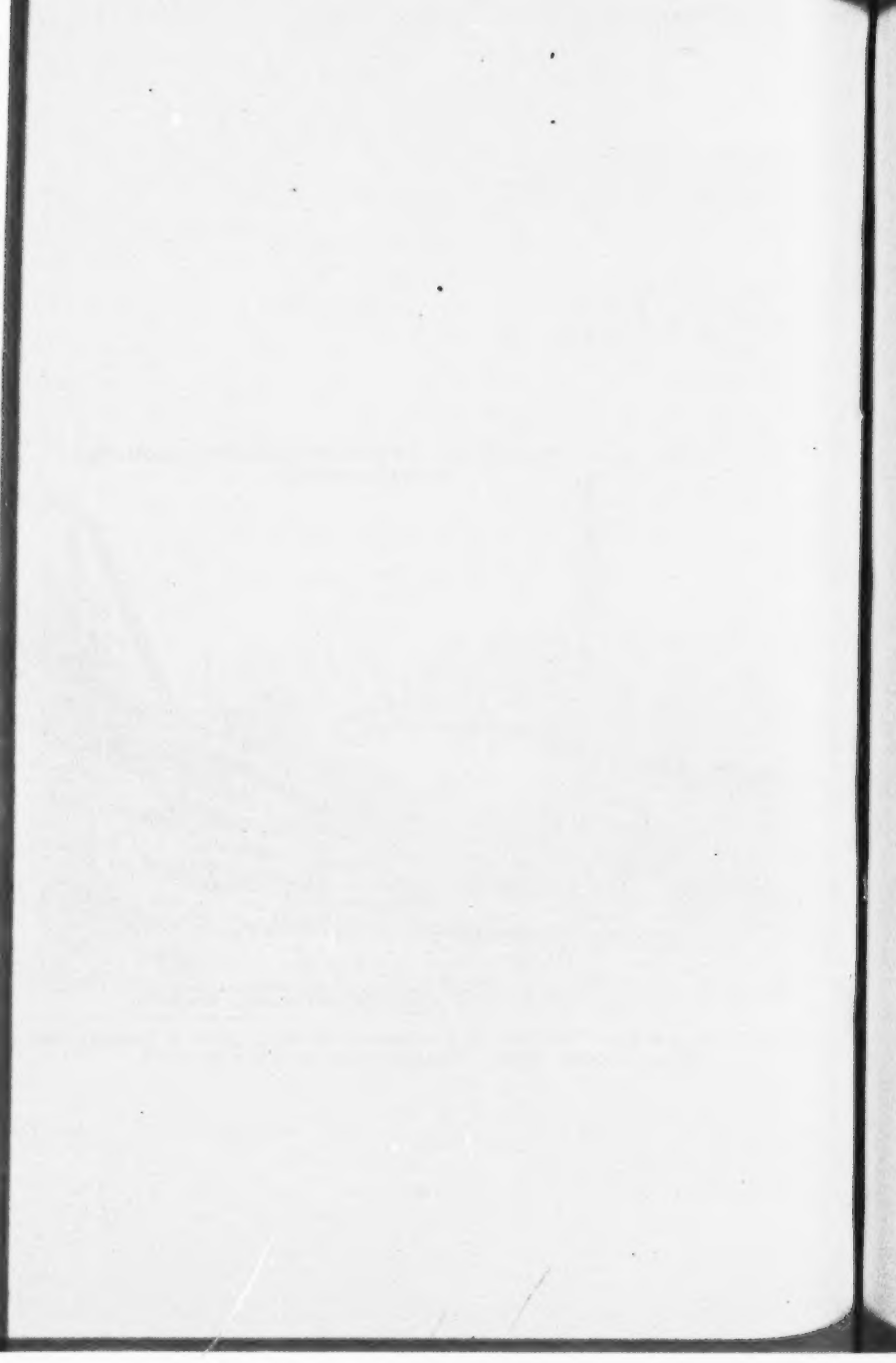
FILED IN THE U.S. CIRCUIT COURT, FEB. 20, 1897—A. REEVES AYRES, Clk—SAM'L D. BRIDGES, Dep.
 DEFT'S EXHIBIT '2.



County Road Crossing $\frac{1}{2}$ mile East of Elma, on U.R.R. of W. Looking Southerly.

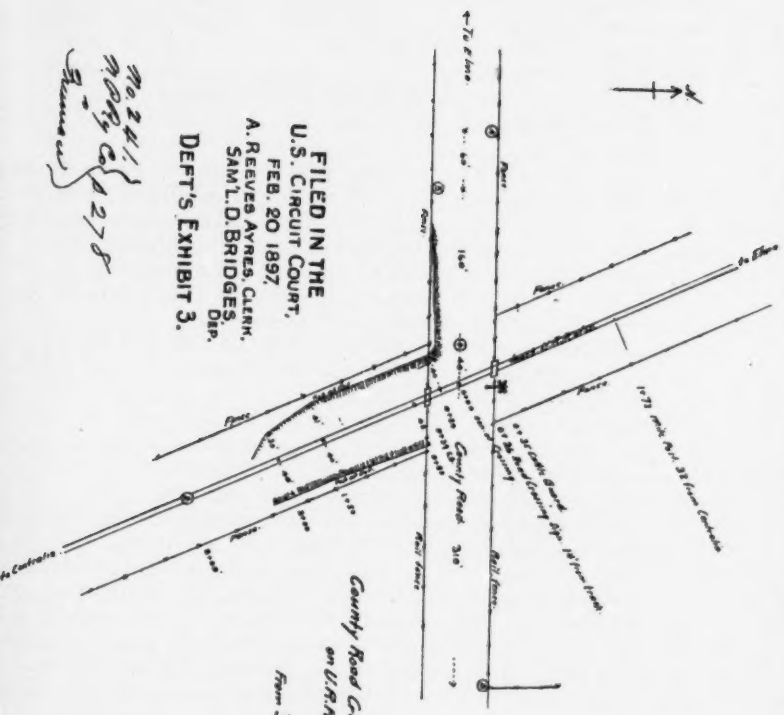
Photo taken Tuesday, Jan. 7, 1896. C. E. S.

Camera at (1) 40 ft. from track cen. of road. Caboose (front end) at (2) 300 ft. Southerly from centre of crossing. Width of Cut in foreground varies from 80 to 85 ft.

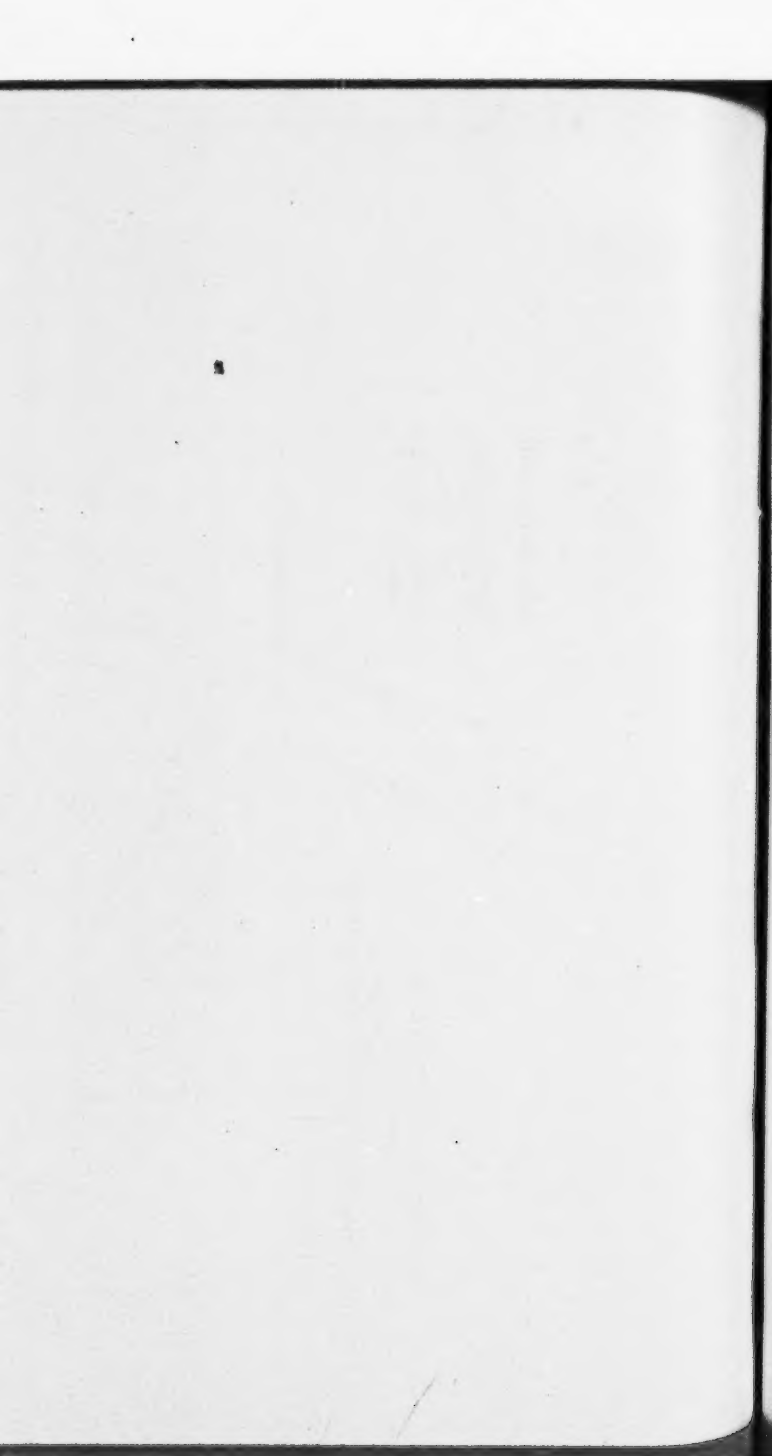


FILED IN THE
U.S. CIRCUIT COURT,
FEB. 20 1897.
A. REEVES AYRES, CLERK,
SAM'L D. BRIDGES,
DEP.
DEPT'S EXHIBIT 3.

County Road Crossing 1/2 mile East of Elma
on U.R.R. of Co.
Scale 1" = 100'
From Survey made by C.A. Jan. 7-1896.



No. 241,
M. J. J. Co. 278
James W.



accident which caused his death, was in his wagon, driving a team at a slow trot along the county road towards a railroad crossing. He was a man of thirty years of age, his eyesight and hearing were good, and he was familiar with the crossing, having frequently driven the same team over it. The team was gentle and was accustomed to the cars. The wagon road crossed the railroad track nearly at right angles. The track at this point was in an excavation eight feet below the elevation of the surrounding country, and the wagon road approached it by a gradual incline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of any train approaching, either from the north or the south, was shut off by the banks of the cut on either side of the wagon road, but at a distance of about forty feet before reaching the track the road emerged from the cut and the view up the track for 286 feet was unobstructed.

It is contended by the plaintiff in error that the trial court should have instructed the jury to return a verdict for the defendant, for the reason that the undisputed testimony shows that the deceased, as he approached the railroad crossing, did not look up the track and did not stop and listen and did not see the train which was approaching in full view, and that therefore his contributory negligence is proven to be such as to preclude his representatives from recovering damages. A careful consideration of the evidence does not convince us that the court erred in declining to give this instruction. There were witnesses who testified, it is true, that the deceased drove his team along the road at a gentle trot, and that he turned his head neither to the right nor to the left and did not stop his team until the train was upon him, but there is evidence, on the other hand, that at about the first point where the decedent could have seen the train after emerging from the cut the tracks of his wagon left the beaten road and swerved to the right, and that the horses crossed the railroad track several feet away from the usual crossing. According to the record there were but three witnesses who saw the accident, two women and a girl of ten years of age. The women were upon the wagon road and were approaching the railroad track from the side opposite that from which the decedent was coming. At the time when the latter was

struck by the train they were from 200 to 250 feet away. 281 They testified that he was approaching at a slow trot, not faster than a brisk walk, and that his speed was uniform up to the time of the accident; that he looked straight before him, without turning his head toward the approaching train, and that his team did not swerve from the direct course in which they were going. The other witness was standing by the side of the road upon the opposite side of the track. She was near the point where the descent of the wagon road into the cut began, and was consequently from 130 to 150 feet from the railroad track. She testified that the decedent passed her, going at a slow trot, and that she saw him drive all the way down the hill; that the team "went down a ways and then run and flew back." She testified further that the horses slowed up—pulled up—and that just when he went down

the train was close to him, "and he saw the train, I guess, and he just tried to get out of the way;" that the horses tried to get out of the way of the train. In answer to the question, "Do you know whether he was looking either way?" the witness replied, "No, sir." It is manifestly impossible in the nature of things that either of these witnesses could testify, of her own knowledge, that the decedent did not look toward the approaching train or that he did not see it as soon as he emerged from the banks and reached a point where it was visible. It does not follow that he did not look and listen from the fact that he was not seen to turn his head toward the approaching train. The wagon road was sandy and the wagon made but little noise. The decedent had the right to believe that any train coming toward the crossing would give the usual signal. There was evidence which went before the jury tending to prove that no signal was given. The majority of the wit-

282 nesses who testified in the case were at the time of the accident so situated that if the train had whistled for the crossing they would have heard it. They all, excepting the conductor, the engineer, and the fireman, of the train testified that they did not hear the whistle, and one testified that the whistle was not blown. When all this testimony is borne in mind it cannot be said that the jury should not have been permitted to decide whether there was contributory negligence on the part of the decedent. *Continental Implement Co. v. Stead*, 95 U. S., 161; *Washington, &c., Railroad Co. v. McDade*, 135 U. S., 554; *Inland and Seaboard Coasting Co. v. Tolson*, 139 U. S., 551; *Grand Trunk Railroad Co. v. Ives*, 144 U. S., 408; *Lynch v. Northern Pacific R. R. Co.*, 69 Fed., 86. It is urged that the court erred in instructing the jury in regard to the elements of the plaintiff's damage, in that it permitted the jury to consider the loss to the wife and children because of being deprived of the use and comforts of the decedent's society. When the whole of the charge upon this subject is considered it will appear that it was not the intention of the court to instruct the jury to measure by their verdict the loss of decedent's society in a sentimental sense or to include a solatium for injury to the feelings of the widow or children, but only the loss of his society in a material and pecuniary sense. The whole of the charge is as follows: "If you find, under the evidence and instructions of the court, that the plaintiffs are entitled to recover damages against the defendants, then in arriving at the amount of such damages you should take into consideration the

age of the deceased at the time he was killed; his probable
283 duration of life had such accident not occurred; his mental and physical condition; his ability to earn money and to support and maintain his wife and children; his ability to care for and protect his wife and children, and to educate and train the latter, and the loss to the wife and children because of being deprived of the use and comforts of his society, and the loss of his experience, knowledge, and judgment in managing his and their affairs, and any and all other things which may have appeared in the testimony enlightening you upon the subject." The portion of the charge which is complained of is here so connected with the remainder of

the instruction as to make it sufficiently clear to the jury that the loss of the use and the comforts of the decedent's society which they were allowed to consider was the material use and comfort which were akin to the other elements of damage contained in the charge and which it is admitted that the law sanctions, the loss of experience, knowledge, judgment, &c. In the case of *Pennsylvania R. R. Co. v. Goodman*, 62 Pa. St., 329, the jury were instructed that damages should be given as "a pecuniary compensation, the jury measuring the plaintiff's loss by a just estimate of the services and companionship of the wife of which he was deprived by the accident." Upon this the court says: "Looking at the entire charge upon the subject of damages, we think it clearly confined to damages, to a pecuniary compensation. * * * Companionship was used to express the relation of the deceased in the character of the services she performed. He merely meant to say that the loss should be measured by the value of her services as a wife or companion." Of similar purport is the case of *Cregin v. Brooklyn, etc., R. R. Co.*, 19 Hun., 343. We find no error for which the judgment of the circuit court should be reversed. It is accordingly affirmed, with costs to the defendants in error.

Ross, circuit judge, dissents.

(Endorsed:) Opinion. Filed Nov. 1, 1897. F. D. Mouckton, clerk.

285 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY and NORTHERN
PACIFIC RAILWAY, Plaintiffs in Error,
v.

SERETTE O. FREEMAN, in Her Own Right and as Guardian of Sarah Freeman, a Minor, and Lennie Freeman, a Minor, by Her Guardian *ad Litem*, C. E. Griffin, Defendants in Error. } No. 365.

In error to the circuit court of the United States for the district of Washington, western division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, western division, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs to the defendants in error.

(Endorsed:) Judgment. Filed Nov. 1, 1897. F. D. Mouckton, clerk.

286 [Endorsed:] No. —. United States circuit court of appeals for the ninth circuit, October term, 189—. Judgment. Filed —, 189—. —, clerk.

287 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, a Corporation,
and The Northern Pacific Railway Company, a Corpora-
tion, Plaintiffs in Error,

vs.

SERETTE O. FREEMAN, in Her Own Right and as Guard-
ian of Sarah Freeman, a Minor, and Lennie Freeman,
a Minor, by Her Guardian *ad Litem*, C. E. Griffin, De-
fendants in error.

Bond.

Know all men by these presents that we, said Northern Pacific Railroad Company, a corporation created by and existing under an act of Congress of the United States of America entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," approved August 2nd, 1864, and the Northern Pacific Railway Company, a corporation organized and incorporated under the laws of the State of Wisconsin, as principals, and Charles S. Mellen and J. M. Hannaford, residents of the city of St. Paul and State of Minnesota, as sureties, are held and firmly bound unto the above-named Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, and to each of them in the full and just sum of fifteen thousand (15,000) dollars, lawful money of the United States of America, to be paid to the said Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and

Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, their heirs, executors, administrators, legal representatives, or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and the successors and assigns of each of said companies, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas the above-named Northern Pacific Railroad Company and the above-named Northern Pacific Railway Company have prosecuted a writ of error in the Supreme Court of the United States to the circuit court of appeals for the ninth circuit to reverse the judgment rendered by said United States circuit court of appeals herein, under date of November 1st, 1897, affirming the judgment of the circuit court of the United States for the district of Washington, western division, under date of March 24th, 1897, in favor of said above-named Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, and against the said Northern Pacific Railroad Company and the said Northern Pacific Railway Company:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railroad Company and the said

Northern Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

NORTHERN PACIFIC RAILROAD
COMPANY,
By C. S. MELLEN, *Its President.*
NORTHERN PACIFIC RAILWAY
COMPANY,
By C. S. MELLEN, *Its President.*
CHARLES S. MELLEN. [SEAL.]
J. M. HANNAFORD. [SEAL.]

In the presence of—

J. H. MITCHELL, JR.
H. L. DOWAHOWER.

289 UNITED STATES OF AMERICA, }
District of Minnesota.

Charles S. Mellen and J. M. Hannaford, being severally sworn, each for himself deposes and says that he is one of the sureties who executed the foregoing bond; that he is worth the sum of fifteen thousand (15,000) dollars over and above all his just debts and liabilities.

CHARLES S. MELLEN.
J. M. HANNAFORD.

Subscribed and sworn to before me this 28th day of December, 1897.

[SEAL.] H. L. DOWAHOWER,
Notary Public, Ramsey County, Minnesota.

The above and foregoing bond approved as to sufficiency of sureties.

Dated at St. Paul, Minnesota, December 30, 1897.

WALTER H. SANBORN,
Circuit Judge, Eighth Judicial Circuit.

Approved Jan'y 8th, 1898.

DAVID J. BREWER,
*Associate Justice of the Supreme Court
of the United States.*

(Endorsed:) Bond on writ of error to Supreme Court U. S. Filed Jan. 22, 1898. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

290 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY and NORTHERN
Pacific Railway Company, Plaintiffs in Error,

v.

SERETTE O. FREEMAN, in Her Own Right and as Guardian
of Sarah Freeman, a Minor, and Lennie Freeman, a
Minor, by Her Guardian *ad Litem*, C. E. Griffin, De-
fendants in Error. } No. 365.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing two hundred and eighty-eight (288) pages, numbered from one (1) to two hundred and eighty-eight (288), both inclusive, to be a full, true, and correct copy of the record and of all proceedings in the above-entitled cause, including the opinion filed, as the originals thereof remain of record in said circuit court of appeals, and that the same constitute the return to the writ of error herein.

Seal United States Circuit Court of Appeals, Ninth Circuit. Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 26th day of January, A. D. 1898.

F. D. MONCKTON, Clerk.

291 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company and The Northern Pacific Railway Company, plaintiffs in error, and Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, defendants in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed, to operate as a supersedeas, by—

DAVID J. BREWER,
*Associate Justice of the Supreme Court
of the United States.*

292 [Endorsed:] Dock. No. 365. Supreme Court U. S. Error to U. S. circuit court of appeals, 9th circuit. Northern Pacific Railroad Company and Northern Pacific Railway Company, plaintiffs in error, vs. Serette O. Freeman, in her own right and as guardian, etc., *et al.* Writ of error. Filed January 22, 1898. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

Return to Writ of Error.

The answer of the judges of the United States circuit court of appeals for the ninth circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said circuit court of appeals, to the Supreme Court of the United States, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

293 UNITED STATES OF AMERICA, ss:

To Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Northern Pacific Railroad Company and The Northern Pacific Railway Company are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the

Supreme Court of the United States, this 8th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

DAVID J. BREWER,

Associate Justice of the Supreme Court of the United States.

294 [Endorsed:] Dock. No. 365. Supreme Court U. S. Error to U. S. circuit court of appeals, ninth circuit. Northern Pacific R. R. Co. and Northern Pacific R'y Co. vs. Serette O. Freeman, in her own right and as guardian, &c., *et al.* Citation. Filed January 22, 1898. F. D. Monckton, clerk U. S. circuit court of appeals, ninth circuit.

We do hereby acknowledge due service of the within citation, by receipt of a true copy thereof, this 19th day of January, 1898, at Tacoma, Washington.

HUDSON & HOLT &
SIDNEY MOOR HEATH,

*Attorneys for Lennie Freeman, a Minor, by Her
Guardian ad litem, C. E. Griffin.*

We do hereby acknowledge due service of the within citation, by receipt of a true copy thereof, this 19th day of January, 1898, at Olympia, Washington.

O. V. LINN AND
J. B. BRIDGES,

*Attorneys for Serette O. Freeman, in Her Own Right
and as Guardian of Sarah Freeman, a Minor.*

Endorsed on cover: Case No. 16,794. U. S. C. C. of appeals, 9th circuit. Term No., 241. The Northern Pacific Railroad Company and The Northern Pacific Railway Company, plaintiffs in error, vs. Serette O. Freeman, in her own right and as guardian of Sarah Freeman, a minor, and Lennie Freeman, a minor, by her guardian *ad litem*, C. E. Griffin. Filed February 11, 1898.

WAS H. HENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1898.

Filed Feb. 27, 1899.

THE NORTHERN PACIFIC RAILROAD COMPANY
AND THE NORTHERN PACIFIC RAILWAY COM-
PANY,

Plaintiffs in Error.

SERGEY O. FREEMAN AND OTHERS,

In Error to the United States Circuit Court of
Appeals for the Ninth Circuit.

Brief for Plaintiffs in Error.

C. W. BUNN,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 241.

THE NORTHERN PACIFIC RAILROAD COMPANY
AND THE NORTHERN PACIFIC RAILWAY COM-
PANY,

Plaintiffs in Error,

vs.

SERETTE O. FREEMAN AND OTHERS.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is a case for damages for death resulting from collision at the grade crossing of a public highway and a railway track. The defendants in error recovered a verdict and judgment of \$9,000 for the death of T. A. Freeman. The action was brought in the Circuit Court of the United States for the District of Washington. The judgment was affirmed on writ of error by

the Circuit Court of Appeals for the Ninth Circuit, Judge Ross dissenting (48 U. S. App. 757). There were two main points in the action as it stood in the Circuit Court; (a) whether the defendant was guilty of negligence in failing to blow a whistle and ring a bell to give notice of the approach of the train to the crossing; (b) whether Freeman, the deceased, who was driving a team on the highway, contributed to the accident by his own negligence. The evidence was in conflict as to the negligence of the railway company and the verdict of the jury must be regarded as having settled so far as the discussion here is concerned, that proper signals were not given by the employes of the defendant. But the evidence was not in conflict as respects the negligence of the deceased. That question as we shall show is one of law and has been brought to this court by proper exceptions. It constitutes the first and leading question to be considered. There is one other question in the case involving the correctness of the instructions to the jury on the subject of damages.

The accident happened on the 20th day of April, 1895, during the operation of the Northern Pacific Railroad by a receiver appointed by the federal court. The action was brought against the receiver and afterwards on the discharge of the receiver was continued against the Northern Pacific Railway Company, purchaser at foreclosure sale, which by virtue of provisions in the

decree of sale had assumed the liabilities of the receiver.

The deceased was passing along a wagon road near the town or village of Elma in the state of Washington, which wagon road crossed the railroad track at nearly right angles. The railroad track was in an excavation, eight feet below the surface of the surrounding country, and the wagon road approached the crossing by a gradual decline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of an approaching train was shut off by the banks of the cut in which the railroad was laid and by trees; but 40 feet before reaching the track the highway emerged from the cut and the view up the track for 300 feet and more was wholly unobstructed.

The deceased was driving a team hitched to a wagon and was moving at a slow trot toward the railroad crossing; he was a man 30 years of age, his sight and hearing were good and he was familiar with the crossing, having frequently driven the same team over it. The team was gentle and accustomed to the cars. This brief statement of the facts cannot be disputed and is taken substantially from the opinion of the Circuit Court of Appeals.

A bill of exceptions was signed and made a part of the record; it is certified to contain all the evidence. At the close of the testimony the defendants requested the court to direct a verdict in their favor on the ground that the undis-

puted testimony showed the deceased to have been guilty of contributory negligence. Exception was taken to the refusal of the court to direct a verdict, also to certain instructions of the court touching the negligence of the deceased, and to one instruction of the court upon the measure of damages.

ASSIGNMENTS OF ERROR.

1. The court erred in refusing to give the following instruction asked by the defendants:

“On the evidence in this case your verdict must be for the defendants.” (Transcript, p. 132.)

2. The court erred in giving the following instruction to the jury:

“Where a party cannot see the approach of a train on account of intervening objects, he may rely upon his ears, and whether he should have stopped and listened under the circumstances is for you, and if you believe from the evidence that the deceased, Thomas A. Freeman, acted and did as a man of ordinary care and prudence would have done as he approached the crossing, then your verdict should be for the plaintiffs, in case you find that the defendants were negligent, and that the collision was due to their negligence.” (Transcript, p. 132.)

3. The court erred in giving the following instruction to the jury:

“There has been some testimony tending to show that the deceased might have seen the approaching train some feet before he reached the track. If you believe that the deceased could have seen the approaching train when he was within a few feet of the track, then it is for you to say, under all the circumstances, whether he used reasonable caution and care to avoid the collision.” (Transcript, p. 132.)

4. The court erred in charging the jury that damages for the death of the deceased might include “the loss to the wife and children because of being deprived of the use and comforts of his society.” (Transcript, p. 133.)

ARGUMENT.

I.

The first three assignments of error will be considered together.

A plat of the ground inserted in the transcript in front of page 153 shows the geography of the accident. The railroad runs approximately north and south, the highway east and west.

The train was coming from the south, Mr. Freeman with his wagon was coming from the west. Points marked "1" and "2" on this diagram are respectively in the center of the highway 40 feet westerly of the railroad crossing and in the center of the railroad track 300 feet south from the center of the highway. In connection with this map the photographs on the two preceding sheets of the transcript should be considered (defendants' exhibit 1 and 2). One is taken with camera in center of railroad track 300 feet southerly from center of road crossing. It shows a view of the road crossing and of a man standing in center of county road at point 1, that is 40 feet west of the crossing. Width of railroad cut varies from 80 to 85 feet. The other photograph is a view taken with camera at point 1, that is in the center of the highway 40 feet west of railroad crossing. It shows down the track a freight train of which 6 or 7 cars are plainly visible. The front end of the caboose is 300 feet and the rear end about 286 feet from the center of the road crossing.

These views we submit ought completely to dispose of the case. The evidence shows that they were taken January 7, 1896, something over a year prior to the trial and about 8 months after the accident. The evidence is also conclusive that there had been no digging or excavation in the meantime and that the ground was in the same condition as when the accident occurred, saving that some bushes had been cut away from the

top of the bank about 300 feet from the highway; these bushes could have no effect on the views shown in the photographs, or to cut off the train from the view of deceased *at or inside* of the point where he was forty feet from the track.

The photographs demonstrate that at a point 40 feet from the railroad in the center of the highway the deceased had a perfectly unobstructed view down the track in the direction from which the train was coming for over 300 feet. Now all the testimony shows that the deceased was driving on a slow trot, moving say 4 or 5 miles an hour. The speed of the train is not in dispute, and that was somewhere from 14 to 20 miles an hour. If the train was moving 16 miles an hour and the deceased 4 miles an hour, the train was 160 feet from the deceased when he came to that point in the highway shown in the photograph 40 feet from the crossing, and it was in full view. If the deceased was travelling 3 miles an hour and the train moving 18 miles an hour, the train was 240 feet from the crossing when the deceased arrived at the point referred to, and was in full view. Upon any possible supposition admissible under the evidence, as to either the speed of the train, or of the deceased, he had an unobstructed view of the train when he came to the point 40 feet from the track where the man is standing in photograph 1. Disregarding all the testimony of eye-witnesses as to how the accident happened, these photographs demonstrate that either the deceased did not look, or that if

he did look he tried to pass over the crossing ahead of the train. And either supposition is equally fatal to the plaintiff's case.

It is immaterial under the authorities and under any rational view, that the deceased could not have seen or have heard the train at some point or points farther than 40 feet from the crossing. That his view was obstructed at such points may safely be conceded. If his view was obstructed it was all the more his duty to look as soon as he came to the point 40 feet or more from the track where his vision became unobstructed. If he had looked there he would have been safe, for with gentle horses, a point 40 feet from the railroad was a point of safety.

But sufficient as this demonstration is, the defense did not rest upon it entirely. There were three eye-witnesses of the accident, all called by the defendants. First, Mabel Wakefield, a girl ten years of age, who with two other children was in the highway on the west side of the track, about 130 to 150 feet distant from it. The deceased passed her and the other children as he drove toward the track and spoke to them. She watched him until the collision occurred; says he was driving at a slow trot, looking at his horses and team; that he drove at about the same trot all the time; that she did not see him look either way, and that when the horses were right close to the track, when the train was right close to him, she saw the horses pull back and

try to turn away from the train. "He was coming down in a slow trot, and when he saw the train then he tried to pull his horses around, just like that (indicating);" then the train struck the wagon. "Why, you know, they were going down the hill at a slow trot, and just then Mr. Freeman saw the train, and the horses saw the train, too, and they tried to get up in that place between the fence and the track;" she says that they turned pretty suddenly; that the train was right there by him when the horses first turned; that when the horses turned, the engine was right across the road; that she saw the horses turn and saw the engine at the same time; that the horses were about 6 feet from the train when they turned. (Transcript, p. 80-88).

Mrs. Minnie Kennedy and Mrs. McDowell were on the opposite side of the track in the wagon road, walking and looking toward the deceased. They were about 200 to 250 feet away. They testified that the team was approaching at a slow trot, that its speed was uniform up to the time of the accident; that the deceased looked straight before him without turning his head either way, and that the team trotted right down on to the crossing; that he did not look in either direction or make any move to stop until just as the locomotive struck him. (Transcript p. 88-97.)

In the opinion of the learned Circuit Court of Appeals the testimony of the Wakefield girl is treated as if it conflicted with the testimony of the two women and as if it furnished good

ground for the jury finding that the deceased looked and listened for the approaching train. The court bases this upon the fact that the Wakefield girl testifies to having seen the horses when almost on the rails and when the engine was on the crossing, shy or jump off to the left, as if to evade the engine. But this view seems clearly erroneous. If the deceased had tried to turn his horses 40 feet from the track, or had stopped there where the train was in view, and the horses had gotten away from him and ran on to the track, the case would be an entirely different one. But the testimony shows that the horses were kind and gentle and that they were all the time under the control of the deceased until just as the engine struck them, and that they did not stop, nor did the deceased look either way until they were substantially on the track. If the deceased had looked when he came in view of the train his horses' heads would have been 30 feet from the track, and with a safe and gentle team there is no reason for supposing that such a position would not have been one of safety; at any rate the jury could not speculate on what might have occurred in that case. The facts conclusively proved here are that the deceased did not look and did not see the train until just as the collision occurred. This is not only proven by the three witnesses but can be demonstrated from the measurements and photographs.

This testimony is further corroborated and the

conclusion strengthened by other testimony in the case. For example, Mr. Bridges, a witness for the plaintiffs, who examined the ground after the accident testified that the track of deceased's wagon diverged from the beaten road "above the crossing, above the planking on the crossing;" that this divergence was made by the engine striking the wagon and the tire of the wagon cutting into the ground. (Transcript, p. 33-34.) Mr. Sommers, another witness for plaintiffs, testified, "The horses had shied out a little to one side and the engine had struck the wagon and knocked it off the ground. The horses had shied out, just like horses will when they saw the engine a coming, and the wagon was thrown to one side of the track when it was hit. There where they had jumped to one side they had scraped up the ground where they struck. They was off to one side of the cattle fence—had got part way across probably. They had jumped clean across and the engine had struck the wagon somewheres about the middle; it was part way across."

Q. How far back was it where the horses had commenced to shy off?

A. Six or eight feet back from the side of the track. There was the track where the horses had shied off and the wagon cut into the ground.

Q. How far back do you think the wagon left the main-traveled portion of the road where you say the tracks showed it had left?

A. Well, it was a little more than six or eight

feet, maybe, where they had shied off. That was where the horses took right onto the track to go across. It looked like they had jumped out of the way of the engine first and then had jumped right across in front of it, across the track and onto the other side. (Transcript, p. 42-43.)

The testimony explains why the engineer did not see the deceased until the latter was just about upon the crossing. The engineer was looking out ahead, but his position being on the right side of the cab and the deceased approaching the track from the left side, the view of the engineer was cut off by the front end of his engine. The fireman whose position was on the left side of the engine was putting in coal.

The train was a regular freight train and was on time.

In the case of *Railroad Company v. Houston*, 95 U. S. 697, a woman on foot was injured by collision with a train, and this court said:

"She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to

pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant." (p. 702.)

In *Schofield v. Chicago, Milwaukee & St. Paul Ry. Co.*, 114 U. S. 615, the court re-affirmed the Houston case quoting with approval the language which we have referred to, and further said, "in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision."

This language is referred to with approval in the case of *Texas & Pacific Ry. Co. v. Gentry*, 163 U. S. 353, 366.

The cases where this court has held the injured party not conclusively to have been guilty of contributory negligence are readily distinguishable.

In *Continental Improvement Co. v. Stead*, 95 U. S. 161, the train was a special train; the plaintiff was following another wagon and in approaching the track could not see a train coming from the north by reason of the cut and intervening obstructions. The plaintiff looked to the southward from which direction the next regular train was to come; his wagon produced much noise as it moved over the frozen ground and his hearing was somewhat impaired.

In *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, the view of the crossing was obstructed until a

traveler was within 15 or 20 feet of the track, and there was evidence that when driving in a buggy his horse would be within 8 feet of the track before he could get a good view in both directions. The deceased was shown to have stopped, presumably to listen for passing trains, and while he stopped, one train passed going out of the city. Soon after it passed and while its noise was distinct, he drove on and just as he reached the railroad track and while apparently watching the train that had passed he was struck by one of the defendant's trains, which was a transfer not running on any schedule and was running at a high rate of speed. It should be noted that the citation by Mr. Justice Lamar of the case of *Sullivan v. New York, New Haven, and Hartford*, 154 Mass. 524, was an inadvertence, for the case does not support the point to which it was cited. That case was sustained upon a statute of Massachusetts providing that there could be a recovery in such cases unless the injured party was guilty of "gross or wilful negligence." The Massachusetts court decides in the case cited that under the common law there could be no recovery, because the plaintiff was clearly guilty of want of ordinary care, but that such want of ordinary care was not necessarily "gross or wilful negligence" under the statute.

In *Baltimore & Ohio Railroad Co. v. Griffith*, 159 U. S. 603, the evidence showed that the train was several minutes behind time; that as the women approached the place at which a train

could be seen they stopped to look and listen, but neither saw nor heard anything; that after stopping they started driving slowly up the hill to a point 40 or 50 yards from the track and there they stopped again and listened but heard nothing; then they drove slowly down the hill both listening all the time, without talking, and heard nothing; that the view was wholly obstructed by a bank 12 to 18 feet high, and that the bottom of the railroad cut was only 15 feet wide, thus obstructing the view until the horse was about on the rails.

In the case of *Texas & Pacific Ry. Co. v. Gentry*, 163 U. S. 353, the deceased was an employe walking across the tracks in the yard on a customary path at night; he was struck by a flat car being pushed in front of a locomotive; the head-light of the locomotive was so arranged that the rays of light passed entirely over the flat car and blinded the eyes of the deceased so he could not see the flat car. The deceased knew nothing of the use of the locomotive and flat car as an appliance for switching purposes.

In *Texas and Pacific Ry. Co. v. Cody*, 166 U. S. 606, the plaintiff was walking along an avenue of a city on a very dark night; as he approached the railroad track he slackened his pace, walked slowly, listened, looked and saw and heard no train; there was no light on the crossing, no bell ringing, no whistle blowing and nothing indicating the approach of a

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 R. Co. v.
 28 U. S.
 Ry. Co. v.
 Clark v.
 49 U. S.

train; as he passed over the track he was struck by a train backed over the crossing, with no light on the front end of it.

> The rule in the state courts will we think be found to be quite uniform when applied to facts like those in this case.

In *Cleveland etc. Railroad Co. v. Elliott*, 28 Ohio St. 340, the view approaching a railroad crossing on highway was obstructed, but at about 60 feet the train could be seen a considerable distance, the court saying;

"It is, therefore, perfectly clear that at a point somewhere about sixty feet from the track, the train can be seen at a considerable distance. Had Elliott approached the track at this point, which he alleges to have been a 'highly dangerous' one, slowly and cautiously, as a prudent man would have done, had he been walking his horses, as it would have been entirely safe to do, if he was not absolutely certain there was no train in the vicinity, within the space of sixty feet, he might have seen and avoided the danger. Ordinary care would have demanded such degree of caution, from the fact that the train was approaching diagonally behind him. But it appears he drove down hill on a trot, upon the track. He also states that after leaving the summit he did not look or listen for an approaching train until he got on the track, and he first saw the train when he was on the track."

In *Penn. Railroad Co. v. Beale*, 73 Penn. St. 504, 509, the court said:

"There never was a more important principle settled than that the fact of the failure

to stop immediately before crossing a railroad track, is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court. It was important not so much to railroad companies as to the travelling public. Collisions of this character have often resulted in the loss of hundreds of valuable lives, of passengers on trains, and they will do so again, if travellers crossing railroads are not taught their simple duty, not to themselves only but to others."

This was said in a case where there was 10 feet of level ground between the railroad and the hill or bluff from which it was claimed the train might have been seen.

The case of *Schaefer v. Chicago, Milwaukee & St. Paul Ry. Co.*, 62 Iowa, 624, is one where the view was obstructed close up to the track, except that there was a place 4 or 5 rods west of the track where the train could have been seen if the driver had stopped and looked. The court said that under the circumstances ordinary care required that he should have stopped and looked or listened at some place; that there was nothing to prevent him doing so and nothing to distract his attention.

This court in the Schofield case quoted with approval the decision of the Supreme Court of Minnesota in *Brown v. Milwaukee Ry. Co.*, 22 Minn. 165. In that case there was testimony that the deceased had looked at several points before he reached the railroad, and listened for trains as he went along. But the court held that

this furnished no excuse for not looking after he passed the obstructions and when he came to a point near the track where he could have seen.

In *Abbett v. Railway Co.*, 30 Minn. 482, the same court passed on a case where the driver could not see up the track until after he passed a point 30 feet from the railroad. Held; he was guilty of negligence for not looking within this unobstructed space of 30 feet.

In *Mantel v. Railway Co.*, 33 Minn. 62, the plaintiff was a street car driver driving a horse car which crossed the railroad. His view was wholly obstructed until he came within 40 feet of the track. He drove his car to that point on a down grade at about 4 miles an hour with his brake half set; after getting close to the track the train came in sight and he was then not able to stop. The court held that he should either have stopped or had his car under complete control when he came to the place 40 feet from the track where he could see 184 feet up the rails.

In *Haas v. Grand Rapids Railroad Co.*, 47 Mich. 401, where the opinion was by Judge Cooley, the facts were very nearly identical with this case. The railroad crossing the highway at right angles passed through a cut in places 16 feet deep; plaintiff was familiar with the crossing having passed it frequently; the deceased was seen to drive to the track on a slow

trot. Judge Cooley says that to move forward briskly as he did from a point where the view was obstructed and not to pause and look after he passed the obstructions approached nearly to absolute recklessness.

In the case of *Brady v. Railroad Co.*, 81 Mich. 616, the view of the crossing was so obstructed that one could not see an approaching train until he was within 20 or 25 feet, and then could see only a few rods up the track. Plaintiff testified that he listened, approached the track on a walk; looked several times without being able to see a train. But the court held that he should have stopped or looked, or taken some other effective means to protect himself after he reached the point 20 or 25 feet from the crossing where he could see up the track.

In *Nelson v. Railway Co.*, 88 Wis. 392, there was a building 30 feet from the railroad obstructing the view of the crossing, but after the injured party passed this building his view was unobstructed. He did not look up the track for the train until his horses were very close to the rails, so that a collision could not be avoided. The case cannot be distinguished from the case at bar and the court held that the injured party was guilty of negligence as a matter of law.

Another case which cannot be distinguished from this is *Moore Admr. v. Keokuk & Western Ry. Co.*, 89 Iowa, 223. There the highway approached the crossing by a gradual descent until

within 30 or 40 feet of the railroad. When the deceased was within 30 or 40 feet of the crossing he could have seen the approaching train if he had looked, and the train must then have been more than 200 feet distant. The dangerous character of the crossing was known to the deceased and it did not appear that he stopped to see if any train was approaching. According to the undisputed evidence of two witnesses he approached the crossing with his horses on a trot. It was held that he was guilty of negligence as a matter of law.

This case is like *Salter v. Utica and Black River Railroad Co.*, 75 N. Y. 273, in which case a person, approaching a railroad in a cut, at 31 feet from the crossing could have seen up the rail $251\frac{1}{2}$ feet and at 41 feet $203\frac{1}{2}$ feet. He could probably have seen trains for 100 feet before reaching the crossing. At 21 feet from the track, if he had stopped and looked and turned his horses he could have avoided the accident. The case stood without any testimony to show what the deceased actually did, but it was held he was guilty of negligence.

See also *Blackburn v. Southern Pacific Co.*, (Supreme Court Oregon, unreported,) 55 Pac. Rep. 225; *Railway Co. v. Duncan*, 143 Ind. 524; *Railroad Co. v. Hogeland*, 66 Md. 149, 161; *Tully v. Fitchburg Railroad Company*, 134 Mass. 499; *Butterfield v. Western Railroad Corporation*, 10 Allen 532; *Tolman v. Railway Company*, 98 N. Y. 198; *Powell v. Railroad Company*, 109 N. Y. 613.

II.

The court gave the following instruction:

"If you find under the evidence and instructions of the court that the plaintiffs are entitled to recover damages against the defendants, then in arriving at the amount of such damages you should take into consideration the age of the deceased at the time he was killed, his probable duration of life had such accident not occurred, his mental and physical condition, his ability to earn money and to support and maintain his wife and children, his ability to care for and protect his wife and children, and to educate and train the latter, and *the loss to the wife and children because of being deprived of the use and comforts of his society* and the loss of his experience, knowledge and judgment in managing his and their affairs, and any and all other things which may have appeared in the testimony enlightening you upon the subject."

The italicized clause in the foregoing instruction was separately excepted to.

We submit that this instruction introduced an improper element into the measure of damages. The loss to the wife and children by reason of being deprived of the "use and comforts of his society" was not a proper element of damage.

The action is based upon a statute, without which no recovery could be had. The provisions of the statute authorizing recovery, so far as applicable to this case, are as follows:

"When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may main-

tain an action for damages against the person causing the death. * * * In every such action the jury may give such damages, pecuniary or exemplary, as under the circumstances of the case may to them seem just." (2 Hill's Code, Sec. 138.)

Under the evidence in this case no recovery could be had for vindictive or punitive damages, and the court so instructed the jury. (Transcript, p. 128.)

This statute was considered by the Supreme Court of the state of Washington in the case of *Klepsch v. Donald*, 4 Wash. 436, 444. The decision in that case was that although the statute does not have the limiting clauses of Lord Campbell's Act, which is the parent of all legislation on the subject, still that in a case not calling for exemplary damages the recovery is limited to *pecuniary* loss. The highest court of the state has thus adopted a construction which brings the statute in line with the law of England and of the other states, except in cases of wanton or wilful wrong calling for punitive damages, and this construction is controlling in the federal courts because the cause of action is created by the statute.

The learned Circuit Court of Appeals disposed of this point by saying that the portion of the charge complained of is so connected with the remainder of the instruction, as that it must have been made sufficiently clear to the jury that the loss of the use and comforts of the society of the deceased, which they were allowed

to consider, was the *material use and comfort*, which were akin to the other elements of damage contained in the charge. The court cites and relies on the case of *Pennsylvania Railroad Co. v. Goodman*, 62 Pa. St. 329. But the jury were not told to consider only *pecuniary* loss arising by their being deprived of the use and comforts of his society, and indeed it is difficult to conceive, if they had been so told, how it is possible for loss of society to be a pecuniary loss in any sense.

In the Pennsylvania case which the court relies on the husband sued for loss of his wife, and the jury were told that they could include "*a pecuniary compensation*, the jury measuring the plaintiff's loss by a just estimate of the services and companionship of the wife of which he was deprived by the accident." Upon this the Pennsylvania court said that the charge was clearly confined to pecuniary compensation in the way of damages, and that the word "*companionship*" was used to express the relation of the deceased in the character of the services she performed, the court saying: "He (the Judge) merely meant to say that the loss should be measured by the value of her services as a wife or companion."

The services of a wife, being of pecuniary value to the husband, for the loss of which he has a right to recover, it is one thing to speak of pecuniary compensation based on a just estimate of the wife's services and companionship;

but quite another thing when the wife sues for death of her husband to say that she is entitled to damage (not necessarily pecuniary) for the "use and comforts of his society."

It seems to us the jury could have understood but one thing from this charge, and that is that they were not restricted to pecuniary compensation, but could give damages to compensate the wife and children for the loss of the husband and father's society. It is elementary that such elements of damages are improper to be considered. *Blake v. Midland Railway Co.*, 18 Q. B. 93; *Gillard v. Lancashire Railway Co.*, 12 Law Times, 356.

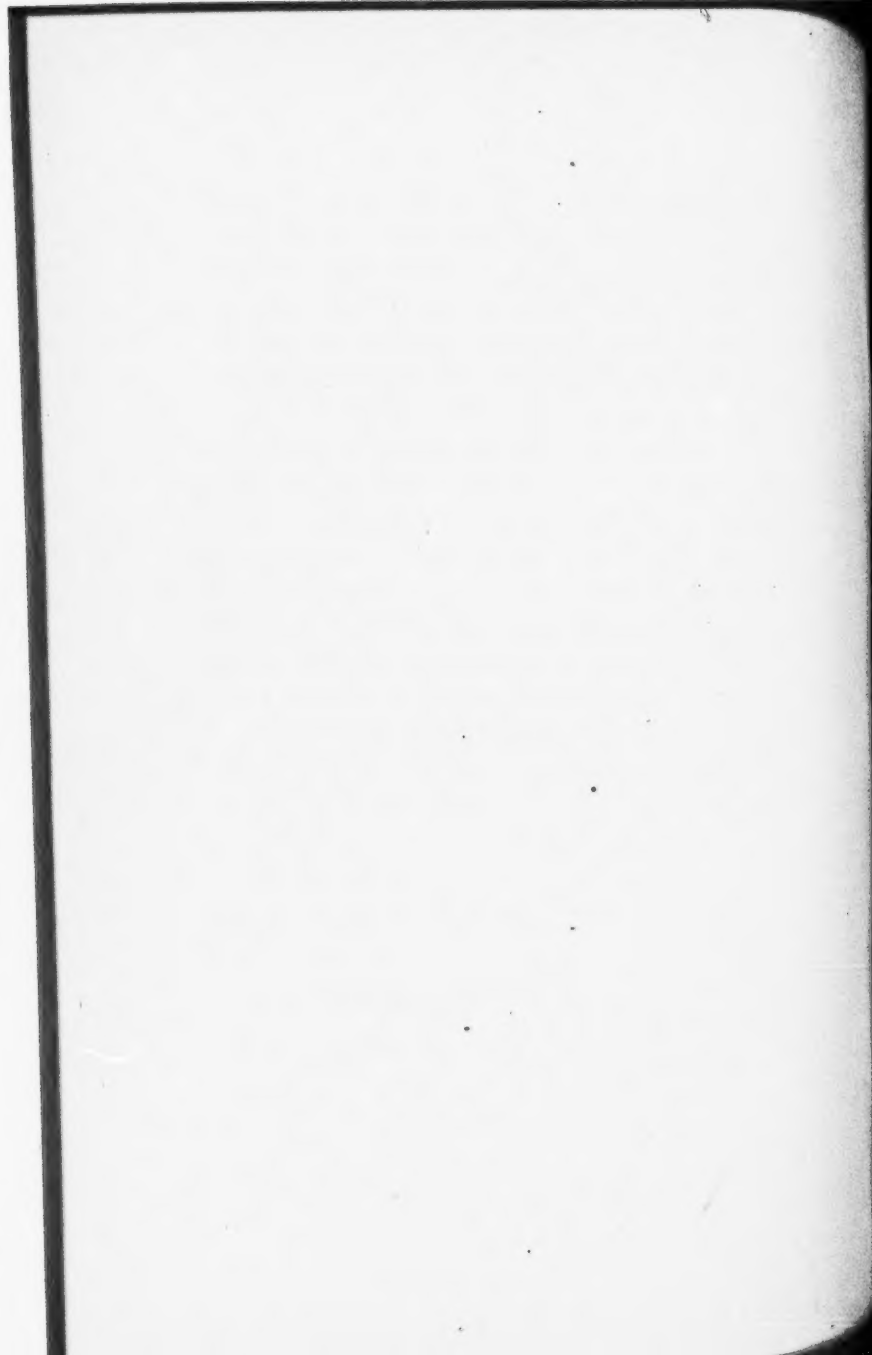
In *Tilley v. Railway Co.*, 24 N. Y. 471, 476, Judge Denio stated the rule which has been almost universally adopted and followed, as follows:

"The word *pecuniary* was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value."

The authorities agree that no recovery can be had for loss of society. *Pym. v. Great Northern Ry. Co.*, 4 B. & S. 396; *Telfer v. Northern Railroad Co.*, 30 N. J. L., 188, 199, 210; *Caldwell v. Brown*, 53 Pa. St. 453; *Baltimore & Ohio Railroad Co. v. State*, 63 Md. 135.

The case of *Board of Commissioners of Howard County v. Legg*, 93 Ind. 523, 530-533 contains a very full discussion of the subject. That case we submit was like this in its facts, the charge there considered reading as follows: "Compensation may also be made for the loss of a parent's care and training to the children in their support, education and maintenance, *and the loss by the wife of her husband's companionship.*" The first part of the charge was held to be correct the last clause to be erroneous. The court reviews and explains the case of *Pennsylvania Railroad Co. v. Goodman* as holding that the instruction in that case, when properly construed, authorized the jury to include only the money value of the wife's services and not compensation for the loss of her society. See also 2 *Sedgwick on Damages*, 8th. ed., sec. 573; *Railroad Co. v. Barron*, 5 Wall. 90, 105.

C. W. BUNN,
Counsel for Plaintiffs in Error.



THE NATIONAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

ALBERTA C. BROWN and others

DEEDLY DEEDS

IN THE
CITY OF NEW YORK

ALBERTA C. BROWN and others
vs.
THE PEOPLE OF THE STATE OF NEW YORK

IN THE
Supreme Court of the United States.

THE NORTHERN PACIFIC RAIL-
ROAD COMPANY AND THE
NORTHERN PACIFIC RAILWAY
COMPANY,

PLAINTIFFS IN ERROR,

v.

SERETTA O. FREEMAN AND OTHERS.

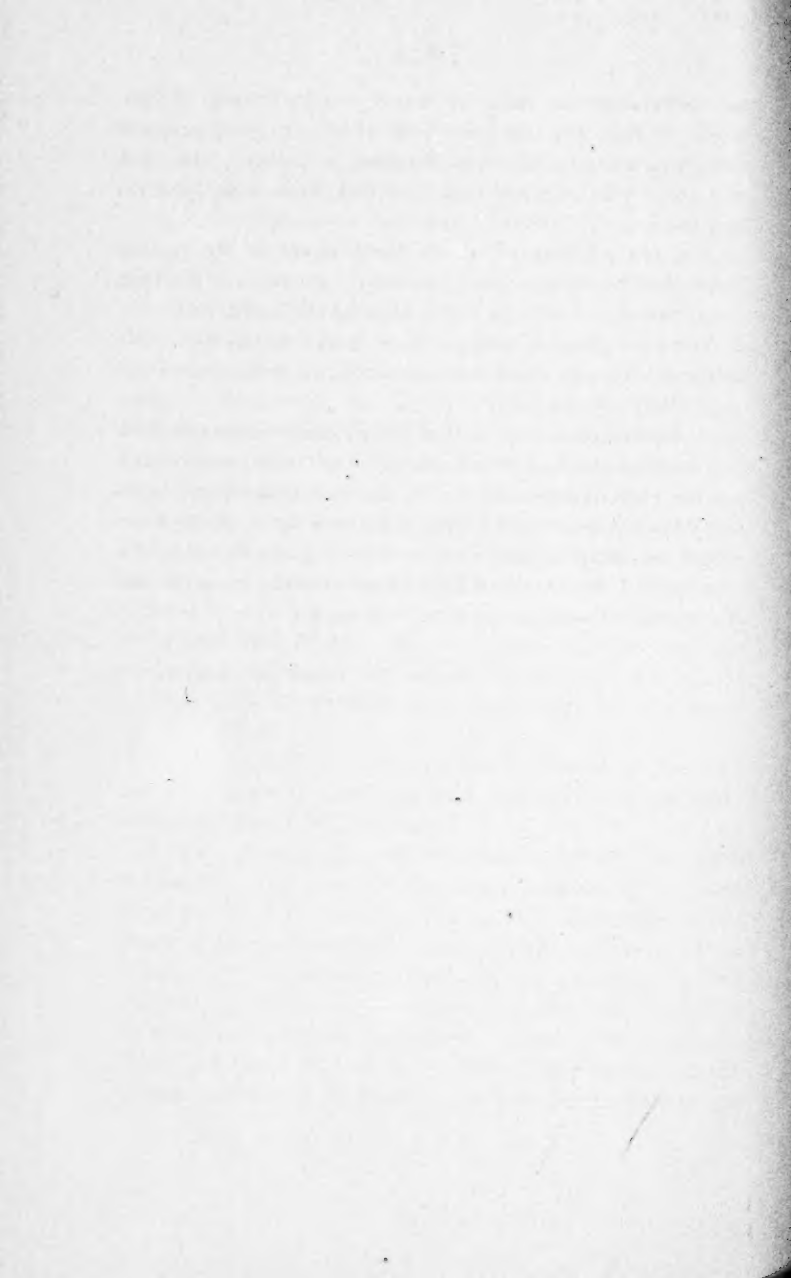
No. 241.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

Counsel for defendants in error concede the correctness in the main of our statement of facts, but question it in one or two particulars. This reply will be confined to showing what the evidence really is upon these points of disagreement.

Counsel claims (brief, p. 4) that witness Baldwin, testifying to the condition of the ground *at the time of the accident*, testified that deceased did not have an *unobstructed* view three hundred feet down the track until he was twenty-five feet from it (instead of forty feet as we have stated the fact.)

In our statement we aimed to give the facts most fav-



In the Supreme Court of the United States.

OCTOBER TERM, 1898.

NORTHERN PACIFIC RAILROAD
COMPANY, AND THE
NORTHERN PACIFIC RAILWAY
COMPANY,

Plaintiffs in Error,

VS

SERETTE O. FREEMAN, IN HER
OWN RIGHT, AND AS GUARDIAN OF
SARAH FREEMAN, A MINOR, AND
LENNIE FREEMAN, A MINOR BY
HER GUARDIAN *ad litem*, C. E.
GRIFFIN, *Defendants in Error.*

No. 241.

In error to the United States Circuit Court of Appeals
for the Ninth Circuit.

STATEMENT.

Defendants in Error adopt the Statement of the Plaintiffs in Error in their Brief in this cause, except that part of the Statement containing the following words: "But the evidence was not in conflict as respects the negligence of the deceased. That question as we shall show is one of law and has been brought to this court by proper exceptions. It constitutes the first and leading question to be considered."

We claim the evidence is in conflict on this question. And except the further Statement, "But forty feet before reaching the track the highway emerged from the cut and a view of the track for three hundred feet and more was wholly unobstructed."

We claim that the evidence of the only witness who testified as to the condition of the ground at the time of the collision shows that the deceased did not have an unobstructed view for this distance (see testimony of Baldwin, Record pp 54-55) until within twenty-five feet of the near rail of the track, while the horses heads would necessarily be ten or twelve feet nearer the track than the deceased, and that he did not have an unobstructed view for any considerable distance down the track until he was within about thirty feet of the near rail and his horses heads consequently not over eighteen or twenty feet from the same; and that the conditions had been considerably changed with reference to the obstructions to view between the time of the accident and the time about which the witnesses generally testified as to the views, etc.

ARGUMENT.

The only questions presented by the Plaintiffs in Error for consideration by this court, are:

First: As to whether or not there was any conflict in the evidence as to contributory negligence by the deceased;

Second: As to whether or not the court erred in granting the instruction on the measure of damages,

on account of the following expression therein, "and the loss to the wife and children caused by being deprived of the use and comforts of his society."

POINT I.

Under this head in brief of plaintiffs in error, it is claimed that the Court should have instructed the jury to find for the defendant; because the evidence was not in conflict as respects the negligence of deceased.

In making their argument on this point, they appear to us to take into account only a portion of the testimony. The preponderance of the evidence, we believe, shows that the deceased had full control of the team he was driving; was paying attention; slowed up his team at the top of the hill and went down the hill no faster than one would walk; that in going down the hill his horses were in such gait as horses naturally are in a walk down a hill with the wagon pushing on them; that he was driving slowly; that at the very first opportunity he saw the train and recognized his danger; that the horses then became frightened and dashed across the track. We believe the testimony showed all this clearly, and certainly there was more than sufficient evidence for the Court to let the case go to the jury. There was certainly more than a scyntilla of evidence against negligence on part of deceased. See

Chesapeake & O. R'y Co. vs. Steele, 84 Fed.
93, (c c a).

R'y Co. vs. Lowery, 20 (c c a), 596.

Ins. Co. vs. Randolph, 24 (c c a), 305.

R'y Co. vs. Slattery, 3 app., cases 1155.

In the case of Indianapolis, etc., R. R. Co. vs. Horst, 93 U. S. 298, the superior court lays down the rule that contributory negligence cannot avail the defendant unless shown by preponderance of the evidence.

R. R. Co. vs. Gladman, 15 Wall. 401.

Hough vs. R'y Co, 100 U. S. 213.

Coasting Co. vs. Tolson, 139 U. S. 551.

R. R. Co. vs. Volk, 151 U. S. 73.

R. R. Co. vs. Gentry, 163 U. S. 353.

The case of Continental Imp. Co. vs. Stead, 95 U. S. 161, was one where the party injured did not look in the direction from which the train was coming with which he collided; his wagon was making considerable noise upon the frozen ground so he could not hear well; the train was a special one and the defendant supposed the regular trains would be coming from the other direction and hence kept his lookout in that direction alone. The appellate court sustained the refusal of the trial court to charge that defendant could not recover, and says: "On the other hand those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greater incentive to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed without evidence, that they do not exercise proper care in a particular case." And again: "Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would

exercise under the circumstances of the case in endeavoring to fairly perform this duty."

The same doctrine of the question of negligence being one for the jury is set forth in the case of Railroad Co. vs. Pollard, 22 Wall 347.

In the case of Railroad Co. vs. McDade, 135 U. S. 571, the Court says: "As a general rule the question of contributory negligence is one for the jury, under proper instructions from the Court especially when the facts are in dispute, and the evidence in relation to them is that from which fair minded men may draw different inferences." See Texas & P. Ry. Co. vs. Cody, 166 U. S. 606.

In the case of Inland & Seaboard Coasting Co. vs. Tolson, 139 U. S. 551 the Court holds that contributory negligence of the party injured would not prevent him from recovering if the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence. The same doctrine is maintained in Railroad vs. McDade, 135 U. S. 554. See also Wharton on Negligence, sec. 338, and Railroad Co. vs. Ives, 144 U. S. 429 and cases cited. The evidence in this case is such that according to the statements of the engineer and fireman they should have seen the deceased in time to have avoided the collision. It was proper for the jury to say whether they did see or could have seen him and whether they could have avoided the collision.

In the case of Railroad Co. vs. Converse, 139 U. S. 469, the facts show that the party injured was struck

by a section of a freight train making a flying switch. He saw the approaching train as he approached the crossing in a covered buggy with the top up. When the engine and part of the cars passed, he drove upon the track and was struck and injured by the following section of the train; and the Court held that the question of the contributory negligence of the plaintiff was for the jury and not for the Court.

The case of *Railroad Co. vs. Ives*, 144 U. S. 408, was one in which the facts were equally as strong in favor of the plaintiff in error as in this, but the Court held it to be a proper case for the jury to determine the question of contributory negligence. In response to an argumnt in this case on the part of the railroad that the question of contributory negligence shoulp have been decided by the Court, Justice Lamar says: "As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the Court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or, perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person, under similar circumstances, was

no more a question of law for the Court than was the question of negligence on the part of the defendants. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other." This is the leading U. S. case upon this question and was followed in the following cases:

Railway Co. vs. Farra, 66 Fed. Rep. 496.

C. & N. W. Ry. Co. vs. Netolicky, 67 Fed.
Rep. 665,

Lynch vs. N. P. R'y. Co., 69 Fed. Rep. 86.

Railway Co. vs. Spradling, 72 Fed. Rep. 152.

Northern Cent. R'y vs. Herdriskel, 74 Fed.
Rep. 460

Cobleigh vs. Grand Trunk R'y, 75 Fed. Rep.
247.

St. Louis & S. F. vs. Barker, 77 Fed. Rep. 810.

Baltimore & O.R. Co. vs. Griffith, 159 U S. 603.

In the case of Lynch vs N. P. R'y Co., supra, the court says: "Every interence favorable to the plaintiff that can fairly be drawn from the testimony must be conceded to him in deciding the question presented in this case;" and again: "The question presented in this case is whether the plaintiff looked and listened within a reasonable distance from the crossing. What then is such reasonable distance. Manifestly this is to be inferred AS A FACT from the circumstances of the case. It is not a matter of legal judgment, but one of general observation and practical experience. It may be said, without doubt, that it would have been more prudent in the plaintiff to have

looked when he was much further from the crossing than he was at the time he did look, but it is not a question of great or relative care. It is a question of reasonable care." This is the view entertained by all the Federal courts and very generally by the state courts.

Wood on Railroads, p. p. 1522, 1530, 1548.

Mossler vs. C. B. & O. R'y, 73 Ia. 268.

Plummer vs. Eastern R'y, 73 Me. 589.

Linderman vs. N. Y. Cent. R. Co., 42 Hun.
306.

Railroad vs. Crawford, 44 Ohio St. 631.

Egan vs. Fitchburg R. R. Co., 101 Mass. 315.

Railroad vs. Hall, 61 Pa. St. 361.

Elert vs. Railroad, 48 Wis. 606.

As to the amount of diligence to be exercised by a party approaching a railroad crossing, see

Sherman and Redfield on Negligence, Sec.
478.

McKay vs. Railroad, 35 N. Y. 75.

Railroad vs. Lee, 87 Ill. 454.

Loucks vs. Railroad, 31 Minn. 526.

Schnurr vs. Penn. R'y. Co., 107 Pa. St. 8.

Strong vs. Railroad, 61 Cal. 326.

Railroad vs. Crawford, 24 Ohio St. 631.

It was a physical impossibility for Mrs. Kennedy and Mrs. McDowell to tell whether the deceased was listening for the train or not. They were a consider-

able distance from him and could not tell from the position of his body that he was not looking for a train. He could have seen down the track at the earliest possible moment without turning his body. They were not close enough to see the direction in which his eyes were turned; and it was impossible for them to tell whether he was looking and listening or not even under favorable circumstances, and their evidence develops the fact that they were so excited that they didn't even see the team leave the beaten path on the road and dash around to the left. This point is fixed not only by the evidence of the little Wakefield girl, one of the witnesses for plaintiffs in error, but by other witnesses by the course of the wagon tracks. That deceased could have seen down the track without turning his body will readily be seen by looking at the diagram and photographs in the record.

In the absence of positive evidence to the contrary, it will be presumed that deceased did all that a prudent man would have done under like circumstances

Texas & P. R'y. Co. vs. Gentry, 16 Sp. Ct.
Rep. 1104.

Schnurr vs. Penn. R. R. Co., 107 Pa. St. 8.

Railroad Co. vs. Crawford, 24 Ohio St. 636.

Continental Imp. Co. vs. Stead, 95 U. S. 161.

There were but three eye-witnesses who testify in this case and one of these, Mabel Wakefield, contradicts fairly the other two as to what happened there. (See Record, pages 82 to 88 inclusive.) She says that the team first stopped and pulled back. That deceased

then tried to turn them to the side, and that they then tried to get away, and ran across the track. The evidence of the witnesses for defendant in error supports her evidence except as to the distance of the horses from the track when they turned out; but it should be taken into consideration that she was behind deceased and upon the top of the hill, not in a position to judge accurately of the distance on account of the angles. Witness Baldwin at Page 45 of the record says the wagon left the main beaten track of the road at a distance of about twenty feet from the railroad. And the fact that the wagon crossed the railroad with a space of about six feet between it and the crossing as testified by Baldwin on Page 50 of record shows that he was probably right as to the distance back at which they turned out. All of this evidence shows that the deceased probably saw the train at about the earliest moment at which he could have seen it; and the team took fright at their proximity to the approaching train and became unmanageable. The evidence of Mabel Wakefield on Page 82 of the record shows that deceased was not negligent but was trying to save himself and team, and that instead of being listless and inert, he tried to get out of the way.

The condition of the wagon road made it unnecessary for deceased to stop under ordinary circumstances. The road bed was covered with sand and the wagon was a new one and made little if any noise. Witness Kocher testifies as to the wagon making no noise, at page 63 of the record; Mrs. Freeman at page 72 testifies as to the wagon being new, and Springer at page

75 fixes the character of the road bed. In view of these facts and the fact that a train could usually be heard there as testified to by most of the witnesses for defendants in error, show that it was not ordinarily necessary for one to stop to listen in approaching this crossing in order to hear a train coming from the direction in which this one was coming.

In their argument and cases cited in their brief, plaintiffs in error seem to go on the theory that the undisputed testimony shows that deceased did not look, stop or listen, and did not see the train. In all of this they are mistaken. There was strong proof that he did listen and that he saw the train at the earliest moment. In the first place the presumption is that he saw the train as soon as possible; that he used due care; in the second place there is only the testimony of Mrs. McDowel and Mrs. Kennedy which tended to show that he did not look and listen, and we submit that under the facts in this case their testimony on this point can be of but little value for reasons hereinbefore given: the testimony of the little girl—Wakefield—and of the several witnesses who showed beyond dispute that at about the first place decedent could have seen the train, the wagon left the main beaten track and crossed the railroad track several feet out of the way. Certainly, to say the least of it, this testimony was sufficient to justify the court in submitting the question to the jury. To have taken the case from the jury would have been for the court to decide as a matter of law that deceased did not see the train; that he did not try to turn the horses away from the track. The fact

alone, that the horses were turned off the road, at about the first opportunity to see the train, is sufficient to show, it seems to us, almost conclusively that deceased was looking and listening, and saw the train and attempted to avoid the danger. It will be observed that many of the cases cited by plaintiffs in error, come out of those courts where it is held that, where a person is injured, the presumption of law is that he was negligent and such presumption must be denied in the pleadings and overcome in the proof. But in this court no such presumption prevails.

As to wagon leaving traveled portion of road, see Record pages 46, 47, 48. See also pages 82 and 83.

As to the manner deceased's team approached the hill and descended it, see Record; defendant's witnesses, pages 84, 85, 76, 87. See also pages 61 to 64.

It may have been that the topography or lay of the land, with reference to him and others situated as he was, rendered the acoustics such that he could not hear the noise of the train; or the direction of the breeze or condition of the atmosphere was such as to turn the sound aside as suggested on page 66 of the Record by Witness Watson. Something of this nature must have been the case as neither Witness Kocher nor Mabel Wakefield heard the train until it came out of the cut. See Record pp. 63 and 84. This was his misfortune and not his fault.

Plaintiff in error bases his estimate as to the distance the train was away when Freeman could have seen it upon the supposition that the team continued to

travel at a given rate per hour; while the probability is that when they became frightened they dashed across at a much more rapid rate. For this reason it is impossible to tell how sudden the collision was.

POINT II.

The second ground relied on for reversal is the giving by the Court of an instruction with relation to the measure of damage, found on pages 127 and 128 of record. Particular objection is made to that portion of the instruction reading as follows: "and the loss to the wife and children because of being deprived of the use and comforts of his society * *."

We think in reading the whole instruction on this question, it will clearly appear that it was not the intention of the Court that the jury might consider "loss of society" in a sentimental sense, or as causing injury to the feelings of the plaintiffs, but merely from a pecuniary standpoint. The jury are instructed that they should take into consideration deceased's probable duration of life; his mental and physical condition; his ability to earn money and to support and maintain the wife and children; his ability to care for and protect them and educate and train the latter. Immediately following the clause objected to and forming a part of that clause, the jury are instructed that they may take into consideration the loss of decedent's experience, his knowledge and judgment in managing his and their affairs; that under proper facts the plaintiffs would be entitled to compensation "so far as it is susceptible of an estimate in money," and in an instruction following,

used the language: "The rule, gentlemen, is compensation," and generally the instructions impress on the jury the idea of compensation in dollars and cents.

There is nothing in this instruction, taken as a whole, which allows a jury to return any compensation for injured feelings or for grief. Most of the courts have held that instructions allowing the jury to consider wounded feelings, are error.

The Circuit Court of Appeals in this case say in the opinion in referring to this portion of the instruction: "The portion of the charge which is complained of is here so connected with the remainder of the instruction as to make it sufficiently clear to the jury that the loss of the use and comforts of the decedent's society which they were allowed to consider was the material use and comfort which were akin to other elements of damage contained in the charge, and which it is admitted that the law sanctions, the loss of experience, knowledge, judgment, etc.," which seems to us to be the correct view.

Some of the courts have held that the jury is not entitled to consider "the loss of companionship" of the husband or father; but that is where the instruction was so given as that it allowed the jury to consider the loss of companionship from a sentimental standpoint, and not from a pecuniary standpoint.

But the instruction complained of is "the loss to the wife and children because of being deprived" not of the companionship or society, but "of the use and comforts of his society, the loss of his experience,

knowledge and judgment in managing his and their affairs."

It is therefore, not the sentimental loss of the society of the husband that the jury are instructed to consider, but the "use and comforts of his society," the benefits which his presence would be to them.

Upon examination of the authorities cited by plaintiffs in error on this question as far as accessible, we observe that the objectionable instruction is simply as to the "loss of the society and companionship." They hold that such instructions are error because they do not confine the jury to a pecuniary damage. But where the instruction is so framed as that only the pecuniary loss is to be considered resulting from the loss of companionship, we believe the objectionable qualities are removed. To say that the jury may consider the "loss of the use and comforts of society," "in so far as it can be estimated in money" is simply to say that it may consider the pecuniary loss. "Use and comforts of society" means the use and comforts derived from his services, his being with them and advising and assisting them in the conduct of their affairs. Certainly the plaintiffs are entitled to recover for the pecuniary loss resulting to them because of being deprived of his presence with them. The benefits pecuniarily to be derived by a wife and children from the use of the society of a kind and competent husband and father, would be great and form one of the chief elements of the advantages and benefits of such a protector.

In the case of *Penna. R. Co. vs. Goodman*, 62 Pa. St. 329, the court instructed the jury as follows: "That

damages should be given as a pecuniary compensation, the jury measuring the plaintiff's loss by a just estimate of the services and companionship of the wife of which he was deprived by the accident; nothing is allowable for suffering," etc., "But if damages are to be given at all — — they should be a just compensation for the value of the companionship and services lost to him by reason of this unfortunate collision."

Upon this the court say: "Looking at the entire charge on the subject of damages we think it clearly confined to damages—to a pecuniary compensation. —

— — Companionship was used to express the relation of the deceased in the character of the services she performed. He merely meant to say that the loss should be measured by the value of her services as a wife or companion. Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling — —." See also

Louisville-Nashville R. R. Co. vs. McElwain,
34 L. R. A. (Ky.) 788.

In *Grolenkemper, et al., vs. Harris*, 25 Ohio St. 512, the court say: "The rule furnished by the statute is that the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the next of kin of the deceased person. It is evident that this contemplates the allowance of damages other than such as would immediately and directly follow from the wrongful act of the defendant."

In the case of *Cregin vs. Brooklyn etc.*, R. R. 19 Hun, 343, the court sustained the following instruction: The jury should confine themselves "to what the husband suffered in respect to nursing, attendance, doctor's bills, the deprivation of ordinary affairs, of regular attendance, services, comforts of his wife's society." The last few words were objected to. The court say: "The plaintiffs are already entitled to damages for actual loss of services occasioned by the injury. Why not the loss occasioned between the personal service of a stranger and a wife, which is what I understand by the word 'comforts,' in the charge? It is not the value of a hired nurse, but the loss to the husband of the services and the comforts derived therefrom of his wife. How can one be separated from the other in assessing damages to a husband for the loss of his wife's services?"

See same case in 75 N. Y. Repts, 187.

In *Ainley vs. Railroad*, 47 Hun., 206, the court say, "the rule is that if the husband is entitled to the assistance and society of his wife, he is entitled to recover damages against a party who unjustly deprives him of such assistance and society, and there does not seem to be any reason, if the fact exists that he was deprived of such assistance and society by the act of another, why he should not recover."

Blair vs. C. & A. Ry. Co., 89 Mo., 335.

McKinney vs. Stage Co., 4 Iowa, 420.

Cooley on Torts, 226.

Furnish vs. Railroad, etc., 102 Mo., 669.

Plaintiff in error in its brief states that formerly California courts held that general loss of companionship could be taken into consideration in estimating the damages, but that the recent decisions of that state have withdrawn from the position formerly taken. In this counsel is mistaken. The California decisions, including those cited by appellant in its brief hold as they have always held, the the "loss of society and companionship," from a pecuniary view, might be considered by the jury in estimating the damage. The first case in California on this subject seems to be Beeson vs. Green Mountain Co. etc., 57 Cal. 20, as part of the instruction in that case was as follows: "and the injury, if any, sustained by her (the wife) in the loss of his (her husband) society." This instruction the supreme court upheld as proper. The court say: "We think that the social and domestic relation of the parties, their kindly demeanor towards each other, the society, were parts of all the circumstances of the case, for the jury to take into consideration in estimating what damages would be just." The ruling is based upon the assumption that in these regards there may be a pecuniary damage. And so the California decisions have held to this day, all distinctly following Beeson vs. Greene Mountain, etc., Co., supra in the cases cited by plaintiff in error from California, the court still adheres to this doctrine.

In the case of Pepper vs. Southern Pac. Co., 105 Cal., 402, cited by plaintiff in error, the court held the following instruction to be error: "The measure of damages is not alone the pecuniary loss and injury

sustained by the plaintiff in the loss of his son, as just explained, but in assessing the damages, you may, in addition, take into consideration the loss, if any, sustained by the plaintiff in being deprived of the comfort, society and protection of the deceased." The court held this error because "the loss is not restricted to the pecuniary loss."

All of the California decisions allow the jury to consider the loss of society and companionship from a pecuniary standpoint.

Pepper vs. Southern Pacific R. R. Co. 38 Pac.
Rep. 974,

Monro vs. Coast Dredging Co. 24 Pac. Rep.
303,

Redfield et al vs. Oakland Consolidated Street
R'y Co. 42 Pac. Rep. 822.

In the case of Hye vs. Union Pac. R'y Co. 26 Pac. Rep. (Utah) 979, the court held the following instruction to be good. In determining the question of damages, "you may also take into account the loss of society and the comfort that the parents might take with this child in rearing it and bringing it up * *." The Court say: "To say to the jury that they might consider 'the comfort that the parents might take with this child in rearing it and bringing it up,' is but slightly if any different from saying to them that they might take into account the loss to the parents of the child."

Webb vs. Denver & R. G. R'y 7 Utah 17

We have seen no case where the instruction on this question is like the one given in this case. Always they refer to the "loss of society or loss of companionship." But here it is "loss of the use and comforts of society." It has almost always been held that a child can recover for the loss of training, education and protection of the parent killed. Where, in reason, can be drawn a line between this and "use and comforts of society." The latter expression can only mean the benefits, and material domestic advantages, the social advantages, to be derived by the dependent wife and children. Who will advance the argument that there is not more advantages to be gained by the wife and children from the use of the society of a good husband—advantages such as training, education, protection—than they would derive from a stranger? The pecuniary benefit so to be derived merely by being led into better society would be great. To say that the plaintiffs cannot have compensation for the loss of the use and comforts of the society of deceased, is to argue that his society was of no more value to them than that of a neighbor. So we insist that while "loss of companionship" might be sentimental, the loss of "the use and comforts of society" are surely pecuniary in nature.

The verdict of the jury shows that it did not consider any thing other than the money loss. The deceased was an able-bodied man about thirty-two years old. Under the testimony he would probably have lived some thirty years longer if he had not met with this accident. If he were capable of earning but a dollar a

day, the jury might well have brought in the verdict it did. The verdict is very reasonable in amount. The jury could not have been led into considering any thing other than a purely money compensation.

We think the instruction was proper, and the decision of the lower court should be affirmed.

Respectfully submitted,

S. WARBURTON,

Counsel for Defendant in Error.

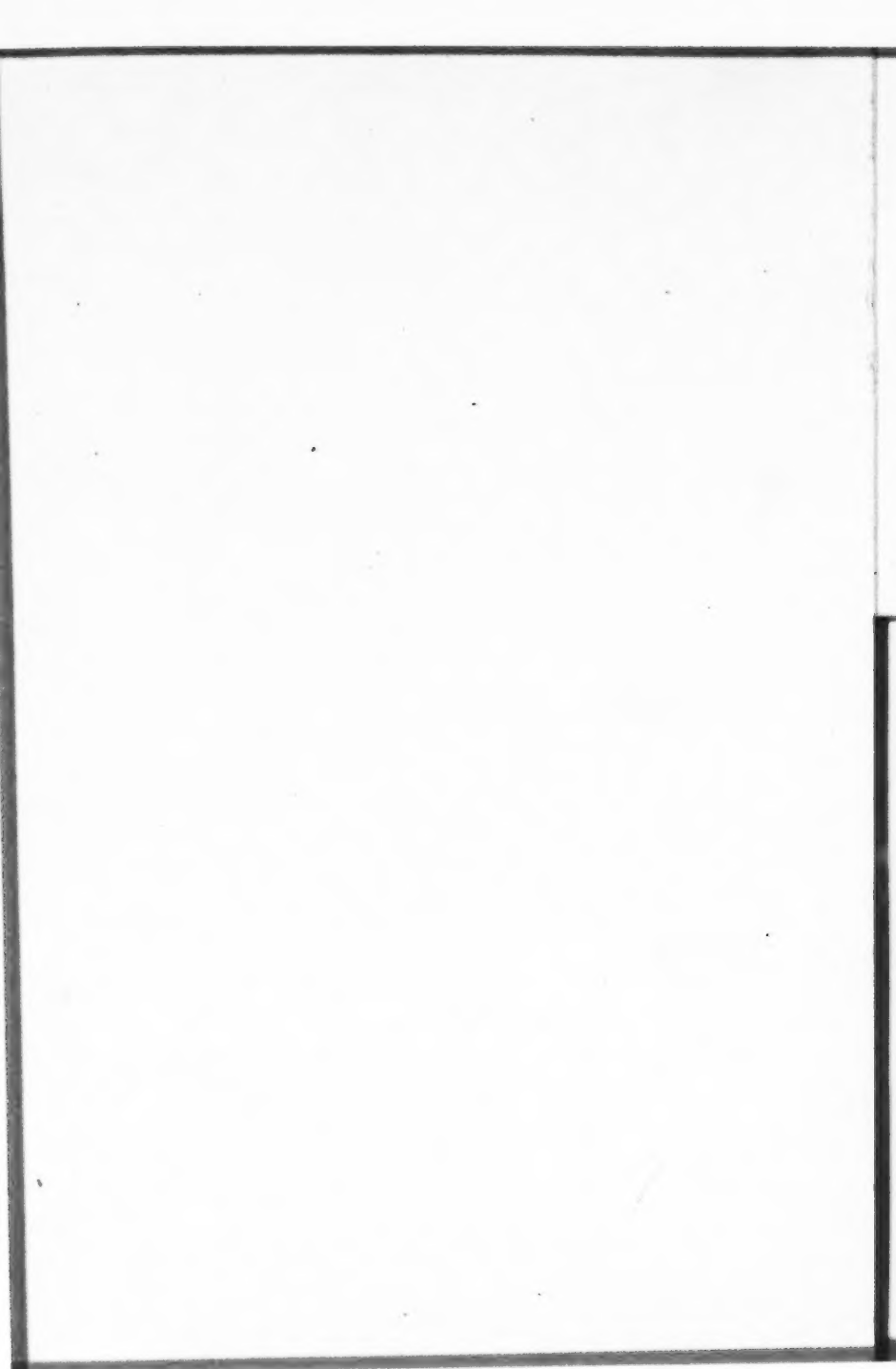
J. B. BRIDGES, Montesano, Wash.,

O. V. LINN, Olympia, Wash.,

SIDNEY MOOR HEATH, Hoquiam, Wash.,

HUDSON & HOLT, Berlin Bldg, Tacoma, Wash.,

Of Counsel for Defendant in Error.



NORTHERN PACIFIC RAILROAD COMPANY *v.*
FREEMAN.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIR-
CUIT.

No. 241. Argued and submitted April 13, 1899. — Decided May 15, 1899.

A highway in the State of Washington crossed the Northern Pacific Railroad at about right angles. It approached the railroad through a deep descending cut, and the track was not visible to one driving down until he had reached a point about forty feet from it. Freeman was driving a pair of horses in a farm wagon down this descent. When he emerged from the cut and reached the point from which an approaching train was visible he was looking ahead at his horses. A train was coming up. The conductor, the engineer and the fireman testified that the whistle was blown. Three witnesses, who were not in the employ of the railroad, and who were in a position to have heard a whistle if it had been blown, testified that they did not hear it. When Freeman became conscious of the approaching train he tried to avoid it; but it was too late, and he was struck by the train and was killed. So far as there was any oral testimony on the subject, it tended to show that Freeman neither stopped, looked nor listened before attempting to cross the track. *Held*, That the testimony tending to show contributory negligence on the part of Freeman was conclusive, and that nothing remained for the jury, and that the company was entitled to an instruction to return a verdict in its favor.

Statement of the Case.

THIS was an action by the widow and minor children of Thomas A. Freeman, originally brought in the Circuit Court for the District of Washington against the receiver of the Northern Pacific Railroad Company, and subsequently, after the discharge of the receiver, continued against the Northern Pacific Railway Company, purchaser at the foreclosure sale, which, by virtue of the provisions of the decree of sale, had assumed the liabilities of the receiver. The object of the action was to recover damages on account of the death of Thomas A. Freeman, which was alleged to have occurred by reason of the negligence of the company.

The accident occurred at a highway crossing near the eastern corporate limits of the town of Elma, in the county of Chehalis, in the State of Washington, at a point where the highway crosses the railway track nearly at right angles.

Upon the trial, counsel for the railway company asked the court to instruct the jury to return a verdict for the defendant, upon the ground that the undisputed testimony showed that the deceased, as he approached the railway crossing did not look up or down the track, and did not see the train which was approaching in full view, and therefore was guilty of such contributory negligence as to preclude the plaintiffs from recovering damages. This the court refused, but left the case to the jury under the following instruction, to which exception was taken: "Where a party cannot see the approach of a train on account of intervening objects, he may rely upon his ears, and whether he should have stopped and listened under the circumstances is for you to say; and if you believe from the evidence that deceased, Thomas A. Freeman, acted as a man of ordinary care and prudence would have done as he approached the crossing, then your verdict should be for the plaintiffs, in case you find that the defendants were negligent and that the collision was due to their negligence."

Counsel further excepted to the following instruction: "There has been some testimony tending to show that the deceased might have seen the approaching train some feet before he reached the track. If you believe that the deceased could have seen the approaching train when he was within a few

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feet of the track, then it is for you to say, under all the circumstances, whether he used reasonable precaution and care to avoid the collision."

Exception was also taken to an instruction to the jury upon the subject of damages, which does not become material here.

Plaintiffs recovered a verdict, upon which judgment was entered for \$9000. The judgment was affirmed on writ of error by the Circuit Court of Appeals for the Ninth Circuit, one judge dissenting. 48 U. S. App. 757.

Mr. C. W. Bunn for plaintiffs in error.

Mr. Stanton Warburton for defendant in error submitted on his brief, on which were also *Mr. J. B. Bridges*, *Mr. O. V. Linn* and *Mr. Sidney Moor Heath*.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

There was testimony from several witnesses in the neighborhood tending to show that no whistle was blown by the engineer as the train approached the crossing. There was also the testimony of the conductor, engineer and fireman that the whistle was blown. As the majority of plaintiffs' witnesses were so located that they would probably have heard the whistle if it had been blown, there was a conflict of testimony with respect to defendants' negligence, which was properly left to the jury.

The real question in the case was as to the contributory negligence of plaintiffs' intestate. For several hundred feet on either side of the highway crossing there was a cut of about eight feet below the surface of the surrounding country, through which the railway ran. The highway approached the crossing by a gradual decline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of a train approaching, either from the north or the south, was cut off by the banks of the excavation on either side of the highway; but at a distance of about forty

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feet before reaching the track the road emerged from the cut, and the view up the track for about 300 feet was unobstructed.

At the time of the accident, Freeman was driving along the highway, going eastward from the town of Elma in a farm wagon drawn by two horses at a slow trot. He was a man thirty years of age, with no defect of eyesight or hearing, and was familiar with the crossing, having frequently driven the same team over it. The horses were gentle and were accustomed to the cars.

The duty of a person approaching a railway crossing, whether driving or on foot, to look and listen before crossing the track, is so elementary and has been affirmed so many times by this court, that a mere reference to the cases of *Railroad Company v. Houston*, 95 U. S. 697, and *Schofield v. Chicago & St. Paul Railway Co.*, 114 U. S. 615, is a sufficient illustration of the general rule.

There were but three witnesses to the accident. Two of these were women who were walking down the highway, and approaching the crossing on the opposite side, facing the team. At the time the deceased was struck by the train, they were from 200 to 250 feet away. They testified that the horses were coming down at a slow trot, not faster than a brisk walk, and that their speed was uniform up to the time of the accident; that the deceased looked straight before him, without turning his head either way; that the team did not swerve but trotted directly on to the crossing, and that the deceased made no motion to stop until just as the engine struck him. The other witness was a little girl, ten years of age, who was standing on the hill on the opposite side of the track, near the point where the descent of the highway into the cut began, and was consequently from 130 to 150 feet from the railway track. The deceased passed her and two other young children who were with her. She testified that as he passed his head was down, and he was looking at his horses; that "they went down ways, and then they run and flew back;" that they were going at a slow trot; that when Freeman saw the train he tried to pull the horses around, as

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if he were trying to get out of the way, when the train struck them.

Another witness was driving behind the team, but he testified to nothing which bore upon the material question whether the deceased took any precaution before crossing the track.

So far, then, as there was any oral testimony upon the subject, it tended to show that the deceased neither stopped, looked nor listened before crossing the track, and there was nothing to contradict it. Assuming, however, that these witnesses, though uncontradicted, might have been mistaken, and that the jury were at liberty to disregard their testimony and to find that he did comply with the law in this particular, we are confronted by a still more serious difficulty in the fact that if he had looked and listened he would certainly have seen the engine in time to stop and avoid a collision. He was a young man. His eyesight and hearing were perfectly good. He was acquainted with the crossing, with the general character of the country, and with the depth of the excavation made by the highway and the railway. The testimony is practically uncontradicted that for a distance of forty feet from the railway track he could have seen the train approaching at a distance of about 300 feet, and as the train was a freight train, going at a speed not exceeding twenty miles an hour, he would have had no difficulty in avoiding it. When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken. The comments of Mr. Justice Field in *Railroad Company v. Houston*, 95 U. S. 697, 702, are pertinent in this connection: "Negligence of the company's employés in these particulars" (failure to whistle or ring the bell) "was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty

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of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence.

The cases in this court relied upon by the plaintiffs are all readily distinguishable, either by reason of the proximity of obstructions interfering with the view of approaching trains, confusion caused by trains approaching simultaneously from opposite directions or other peculiar circumstances tending to mislead the injured party as to the existence of danger in crossing the track.

Upon the whole, we are of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor. The disposition we have made of this question renders it unnecessary to express an opinion upon the instruction as to damages.

The judgment of the court below must therefore be reversed, and the cause remanded to the Circuit Court for the District of Washington, with directions to grant a new trial.

The CHIEF JUSTICE and MR. JUSTICE HARLAN dissented.

